RE-BALANCING ACTS?

AN EVALUATION OF THE CHANGES TO THE RIGHT OF SILENCE AND PRE-TRIAL DISCLOSURE.

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Signature

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Abstract

This thesis examines the direct and indirect effects of the curtailment of the right of silence, (ss34-38 of the Criminal Justice and Public Order Act 1994), and the pre-trial disclosure regime created by Part 1 of the Criminal Procedure and Investigations Act 1996. The effects are explored through critiques of the debates surrounding the introduction of the Acts, associated research, analyses of the case law and a qualitative study of how criminal justice practitioners in one region of England view the provisions. It demonstrates the flaws, in both principle and practice, of the rhetoric of 're-balancing' a system tipped too far in favour of 'criminals' that was deployed in support of these measures and subsequent initiatives that encroach further upon the rights of the accused.

Whilst the direct effects of these Acts have been limited by the small number of cases to which they apply, it is argued that their insidious effects go beyond mere procedural change and have distorted the adversarial nature of the criminal justice system. Both Statutes have imposed quasi-inquisitorial expectations upon the defence, the results of which, the prosecution is entitled to deploy in an adversarial contest. The provisions undermine many of the protections guaranteeing suspects a fair trial, in particular legal advice at the police station, in such a way as to be almost immune from formal challenge. Rather than 're-balancing', the process may be more appropriately characterised as a series of crude "trade-offs" which have compromised the fundamental rights of the defendant and vitiated the fairness of proceedings.

Table of Abbreviations.

ACPO	Association of Chief Police Officers
BCP	Branch Crown Prosecutor
CCRC	Criminal Cases Review Commission
CJPOA	Criminal Justice and Public Order Act 1994
CLRC	Criminal Law Revision Committee
CoP	Code of Practice
CPIA	Criminal Procedure and Investigations Act 1996
CPS	Crown Prosecution Service
CPSI	Crown Prosecution Service Inspectorate
EO	Executive Officer
FME	Forensic Medical Examiner
JOPI	Joint Operational Instructions on the disclosure of unused material
MG6	Police form for passing confidential case information to the CPS
MG6B	Police form for notifying CPS of police officers' disciplinary records
MG6C	Police schedule of non-sensitive material for CPS and the defence
MG6D	Police schedule of sensitive material. Passed to CPS, not defence
MG6E	Disclosure officer's report to CPS recording unused material which might undermine the prosecution or assist the defence.
OCU	Operational Command Unit
PACE	Police and Criminal Evidence Act 1984
PCP	Principal Crown Prosecutor
PII	Public Interest Immunity
PPD	Primary Prosecution Disclosure
RCCJ	Royal Commission on Criminal Justice (1993)
RCCP	Royal Commission on Criminal Procedure (1981)
SCP	Senior Crown Prosecutor
SOCO	Scene of Crime Officer

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Chapter 1: Introduction and The Context to the Changes to the Right of Silence and Disclosure

This thesis seeks to offer a comprehensive examination of the direct and indirect effects of two of the most controversial statutory provisions of recent times: ss34-38 of the Criminal Justice and Public Order Act 1994 (CJPOA), curtailing[1] the right of silence; and the disclosure regime created by Part 1 of the Criminal Procedure and Investigations Act 1996 (CPIA).[2] The impact of these Acts is assessed through a review of the debates surrounding their introduction, consideration of the associated research, and analyses of the developing case law. This is complemented by a qualitative study of how the provisions were seen to be working by a range of criminal justice practitioners in one region of England.

These Acts are examined together as, it is argued, they go beyond mere procedural change and distort the adversarial system under which individuals are investigated and tried. The formal doctrine that the legal burden of proof rests throughout on the prosecution remains unchanged (Redmayne, 1997:85; Jackson, 2001:145). This burden is eased however, by the "normative expectation" (Leng, 2001a:246) created by these provisions, that the accused will cooperate with proceedings from interview to trial. This encroaches upon the other inter-related principles underlying a fair trial: the privilege against self-incrimination and the presumption of innocence. These quasi-inquisitorial expectations inhibit the ability of the defence to test the case for the prosecution. They apply only to the suspect, not to the police and any response (or lack thereof) provided by the suspect, may be deployed by the prosecution in adversarial trial proceedings (Cape, 2003).

The CJPOA was one of the most controversial Acts passed in recent years. It provoked fierce public protest against provisions that were seen as criminalising alternative lifestyles and restricting civil liberties. Its attack upon the right of silence, one of the "sacred cows" (Cross, 1970-1) of British justice[3] was regarded as a dangerous precedent. At the time, most academic opinion condemned the changes to the right of silence as unfair in principle and likely to cause wrongful convictions (Greer, 1994; Dennis, 1995).

Whilst there have been few suggestions that the CJPOA has been a direct cause of miscarriages of justice,[4] subsequent analysis has been divided as to the significance of the

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[1] Such changes have been described variously as "amending" (RCCJ, 1993:50), "modifying" (Easton, 1990:viii), "attenuating" (Mirfield, 1997:246); "curtailing", (Fenwick, 1995a:132), "abolishing" (Greer, 1990), or "eviscerating" (Walker, 1999:12) the right of silence. Whilst it may be argued that a right which incurs penalties in its exercise has effectively been abolished, this overstates the case. Failure to answer questions is not, of itself, an offence (an important distinction for the European Court of Human Rights, see Chapter 5). The right may still be exercised, often resulting in no charge being brought or an acquittal. The terms preferred here are "curtailing" or "changing."

[2] The relevant provisions of both Acts are appended to this thesis and are described below.

[3] The origins of the right of silence are obscure, but it is thought to have emerged between the late Sixteenth and mid-Seventeenth Century as a reaction against the arbitrary inquisitions of the Star Chamber and High Commission. (See Macnair (1990) and Greer (1990) for a discussion of this and other hypotheses.) The 'right of silence' refers to a bundle of rights rather than a single entitlement; Lord Mustill distinguished six meanings (*Director of the Serious Fraud Office, ex parte Smith* (1992) at 463-4), of which the CJPOA relates only to the last: "a specific immunity (at least in certain circumstances) possessed by accused persons undergoing trial, from having adverse comment made on any failure a) to answer questions before trial, or b) to give evidence at their trial."

[4] See Walker (1999) for an exposition of the term 'miscarriage of justice.' The label is applied here to cases in which an individual is convicted of an offence with which they had no connection. Walker

Act. Commentators who focus on the evidential effects of the changes, consider them to have been of only "marginal" significance (Dennis, 2002), or of greater burden than benefit to the prosecution (Birch, 1999). Those who look at the wider ramifications however, have expressed greater concerns about the "sidelining" of defence lawyers (Cape, 1997), the changed status of the police interview (Jackson, 2001), the increasingly inquisitorial powers given to the police (Cape, 2003) and the issues of principle relating to the "coerced participation" of the accused (Leng, 2001:128). It is argued here that, whilst the CJPOA has had limited direct effects upon trials, it has had profound consequences at the police station and upon the benefits to suspects of legal representation.

The CPIA caused similar consternation when it was enacted (Leng, 1995; Sprack, 1997). Whilst attracting less widespread public opposition than the CJPOA, it introduced changes no less profound, what has been described as "the disclosure revolution" (Leng, 1997:216). Its enactment suggested that the CJPOA had indeed signified the beginning of a trend towards greater illiberalism, and facilitated further encroachments upon the rights of the accused. Concern about the CPIA and its potential for causing injustice grew rapidly amongst practitioners and academics (BAFS/CBA, 1999; Plotnikoff and Woolfson, 2001). Some have suggested that further guidance and closer procedural compliance are sufficient remedy to the problems of the CPIA (*Attorney General's Guidelines,* 2000; Epp, 2001). Others argue that the disclosure regime is inappropriate in an adversarial system (Redmayne, 1997); might "snap the golden thread" (Sprack, 1998); and strikes at the common law rules of fairness (Leng, 1997).

The last twenty-five years have been a turbulent period for criminal justice in England and Wales. Significant improvements have been made in the safeguards offered to those under investigation and on trial for criminal offences.[5] The concept of what constitutes a fair trial has developed rapidly through statutory and common law changes and advancements in both European and domestic human rights law. Over the same period however, crime rates, fear of crime, and the political importance of criminal justice have risen. Criminal justice bills have followed the CJPOA and CPIA at least annually, most echoing the rhetoric used to endorse these Acts, of redressing the balance of a system tipped too far in favour of the criminal. It is submitted that such claims of imbalance are flawed in both principle and practice. In an adversarial system, the disparity in power and resources between the individual and the state makes such compensatory measures necessary in order to ensure a fair contest. This thesis explores the dangers of such a reactive and apparently *ad hoc* approach to justice;[6] lessons that can be applied more widely. It demonstrates also the importance of understanding the nature of the system and the occupational cultures of those working within it before introducing such potentially far-reaching changes.

This chapter begins with an outline of how this argument will be developed throughout the thesis. In order to explore fully the significance of the Acts, it is necessary to locate them within the wider framework of the criminal justice system. The remainder of this chapter describes the nature of the system into which the provisions were introduced, demonstrating their inherent unsuitability for an adversarial system and their effects upon the principles guaranteeing suspects a fair trial. The research, debates and developments in the common law

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suggests a wider definition to include convictions achieved by a process which does not respect basic rights (at p34). This notion is accepted implicitly in the argument developed in this thesis that the distortive nature of the changes to the right of silence in particular, have made the system less fair.

[5] In particular: the Police and Criminal Evidence Act 1984; the creation of an independent prosecution service (Prosecution of Offences Act 1985); and the provision and promotion of free legal representation (Legal Aid Act 1985, Access to Justice Act 1999, PACE Codes of Practice).

[6] The pace of change has been unrelenting. The publication of a ten-year plan for change (Criminal Justice: The Way Ahead Cm. 5074, February 2001), before the report of Auld LJ's review of the criminal courts (October 2001), is suggestive of the lack of coherence of policy making in this area.

relating to the right of silence are discussed within the context of the events presaging the introduction of the CJPOA. These include: the reaction against the increased protections given to suspects by the Police and Criminal Evidence Act 1984 (PACE); the infamous miscarriages of justice quashed in the early 1990s;[7] the resulting Royal Commission on Criminal Justice (RCCJ, 1993); and the political imperative to appear "tough on crime." There was little objective evidence that the right of silence was causing undue difficulties in the administration of justice. Conversely, a wealth of studies suggested that not all suspects in police custody were receiving adequate protection and assistance (discussed in Chapter 3). I expand upon Greer's (1994) typologies of attitudes towards the right of silence[8] characterising the changes as "Symbolic Abolitionism"; a gesture of greater political than practical motivation, that has propelled many subsequent proposals. The requirements of the CJPOA are then set out. The CPIA began its progress through Parliament within a year of the right of silence provisions coming into force.[9] Claims that the obligation upon the prosecution to disclose unused material to the defence, or that defence requests for disclosure of unused material were causing significant difficulty in the administration of justice were largely anecdotal. The recently quashed notorious miscarriages of justice, in contrast, demonstrated the dangers of non-disclosure by the prosecution. It is contended that the conflation of the issues of prosecution and defence disclosure was both disingenuous and dangerous as the two issues have separate rationales, impose distinct responsibilities and raise different concerns. The developments in the common law relating to prosecution disclosure and proposals for changes to defence disclosure are then set out. The final part of this Chapter discusses the CPIA provisions.

1.1 Structure of the Thesis

Extravagant and often unsubstantiated claims were made when the CJPOA and CPIA were introduced. Much has been written about the theoretical implications of the Acts and their effects, but there has been relatively little evaluation of the changes in practice.[10] Straightforward analyses of the case law or quantitative studies of changes in the number of no comment interviews or defendants not testifying, whilst important, are insufficient. They ignore the symbolic importance of the Acts, their interaction with the working practices of those responsible for their implementation and their impact upon the nature of the system. In examining the effects of the Acts, this thesis draws upon the relevant literature and develops it through a programme of in-depth interviews and questionnaires conducted with a range of criminal justice practitioners in one region of England. The methodology used is described in Chapter 2. These interviews also provide useful contextual data about the nature of legal representation and the attitudes of the police, prosecutors and barristers. The Acts run counter to much of what was already known about the occupational practices of those involved and many of the problems experienced with their implementation stem from this. I explore the practical and cultural changes the legislation has made to the manner in which the various groups work and how their respective *modus operandi* have influenced the practical implementation of the statutes (Leng, 1999:230).

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[7] See footnote 40.

[8] Utilitarian Abolitionism, Exchange Abolitionism, Symbolic Retentionism and Instrumental Retentionism (discussed below).

[9] Leng and Taylor describe the speed with which the CPIA was enacted as an "ambush of Parliament" (1996:6). The time constraints imposed meant that large sections of the bill were never debated. The right of silence provisions came into effect on April 1st 1995, the main disclosure provisions came into force on April 1st 1997 for cases in which the investigation began on or after that date.

[10] Bucke *et al.*, (2000) conducted a 'before and after' study of the effects of the CJPOA based on case reports, an observational study in police stations, questionnaires issued to interviewing officers and interviews with criminal justice professionals. The studies undertaken in Northern Ireland (JUSTICE, 1994; Jackson, *et al.*, 2000) provide useful comparative data.

Criticism has been expressed about the failure of the courts to consider the "procedural context" in which the right of silence immunities were withdrawn by Parliament (Jackson, 1994:277). The European Court of Human Rights (ECtHR) has recognised that the right to a fair trial, as guaranteed under Article 6 of the European Convention on Human Rights (ECHR) is meaningless without adequate safeguards at the investigative stages. The protective aegis of the Convention is thus being extended to cover the pre-trial process (*Bonzi* v *Switzerland*, 1978; *X* v *UK*, 1979). Research into potential sources of miscarriages of justice must also address these early stages (Ashworth, 1998:52).[11] Chapter 3 examines therefore, the detention and interviewing of suspects at the police station, the initial context in which suspects decide whether or not to exercise their right of silence.[12] Whilst acknowledging the improvements that have been made in the treatment of suspects, it critiques the premise of the 'balancing' argument used to restrict suspects' rights, by demonstrating the inadequacies in the protections suspects received before the CJPOA and the deficiencies that continue to exist. Few suspects made no comment interviews before the CJPOA, of those who did, almost half were convicted (Leng, 1993); even fewer remain silent now (Bucke *et al.*, 2000). Chapter 3 illustrates some of the flawed assumptions underlying the CJPOA, such as the extent and adversarialism of legal representation, and about the ability of suspects to understand the caution and to make informed decisions as to whether or not to remain silent. The Act accords with prevailing police attitudes about 'appropriate,' i.e. compliant, behaviour from suspects, and about the innocent having nothing to hide. It has reduced the combative nature of many interviews, as the police no longer regard obtaining a confession as an imperative. The provisions boosted the morale of police officers initially (c.f. Jackson *et al.*, 2000), although some have expressed frustration that the Act had not had the impact for which they had hoped. It is argued that the most damaging effect of the Act has been its impact upon legal representation. The potential evidential significance of advice to remain silent has introduced a tension into the solicitor/client relationship. Some representatives attach greater significance to protecting their own position than that of their client. Legal representatives have no power to enforce their clients' rights or to obtain disclosure of the police case but they could hitherto use a no comment interview as a bargaining ploy. They now have to assess whether the potential risk of inferences being drawn from a no comment interview, should the case be brought to trial, outweighs the risk of providing the police with information which may be used to charge or convict their client. It is contended that this inhibits testing of the prosecution case as the police are under no obligation to disclose their case (discussed further in Chapter 5).

Chapter 4 considers the disclosure provisions. The full effects of the CPIA are difficult to assess as it has been little tested in the courts but serious concerns have been expressed about the potential for injustice which the Act has created (BAFS/CBA, 1999). It is argued that the CPIA has made it less likely that exculpatory evidence will be uncovered, reducing the likelihood of any irregularities or wrongful convictions being exposed. This chapter contends that, both in principle and in practice, the Act runs counter to the adversarial nature and occupational cultures of the system. It ignores the tension that exists between the police and the CPS; it expects the adversarial police to fulfil an inquisitorial function and prosecutors to

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[11] For example, legal advice at the police station was assumed to be of benefit in ensuring fairness to suspects until research such as that of Baldwin (1993) and McConville *et al.*, (1994) demonstrated the inadequate performance of many legal representatives that could perversely disadvantage suspects.

[12] Several groups have powers to question suspects under caution, including store detectives, housing officers and RSPCA inspectors. Inferences may also be drawn from failure to answer questions posed by these officials (s34(4)). Customs and Excise have similar statutory powers to the police, they also prosecute cases. Differences exist between these agencies due to their statutory powers, organisational practices, the nature of the offences and the 'types' of suspects being investigated. This discussion focuses on the police, as they are the largest organisation, most of the literature relates to them and they are the only body to which I was able to gain access.

view material from a defence perspective. It is suggested that the administrative burden imposed by the CPIA has led to routinised, minimal fulfilment of its requirements and the delegation of essential tasks by both prosecution and defence to non-solicitors. The cumulative effects of these factors has led to the emergence of an informal system of disclosure amongst those who believe that the formal system cannot be effective (CPSI, 2000).

Refusal to testify and the domestic and European Convention case law developing around ss34-38 CJPOA are the focus of Chapter 5. The CJPOA has generated a great deal of domestic case law; arguably of disproportionate weight to any evidence it has provided (Birch 1999). The case law reflects only the minority of cases that are contested and appealed, but it influences the conduct and decision-making of practitioners. Whilst no central statistics are kept on the number of defendants who do not testify, it appears that the CJPOA has reduced this markedly (Bucke *et al.*, 2000). The prohibition upon research on juries means that it is not known to what extent jurors are drawing inferences, or to what extent they did before the CJPOA. Contrary to the expectations of many commentators, the CJPOA has been declared not to breach Article 6 *per se* (*Condron* v *UK,* 2001). Whilst the Strasbourg decisions have had a restrictive effect upon the interpretation of the Act, this equivocation has allowed the domestic courts to widen the parameters of the legislation in favour of the prosecution (*Howell*, 2002). Inferences are no longer restricted to subsequent fabrication but can now be used, in effect if not explicitly, for punitive as well as 'evidential' purposes against suspects for not cooperating with the police at the earliest opportunity. The Acts have a direct effect in only a small percentage of cases and have not made a noticeable difference in terms of increasing charge, plea or conviction rates. It is argued, however, that they have had profound effects upon the prevailing climate in which suspects are investigated and tried; there now exists a "normative expectation" (Leng, 2001a:246) that suspects will cooperate with the prosecution. My research provides empirical support for the argument of commentators such as Cape (1997), Jackson (2001) and Leng (2001), who argue that the most profound effects of the CJPOA have been at police station interviews. The Act has effectively made the police interview a part of the trial, without the attendant safeguards, and has undermined many of the existing protections in such a way as to be almost immune from formal challenge under human rights legislation.[13] It is contended that the safeguards afforded at trial are of limited value, as they do not apply when the suspect and solicitor have to make their decisions at the police station. In particular, the CJPOA has eroded the benefits of legal advice, undermined the position of legal representatives with the police and compromised the lawyer/client relationship.

Chapter 6 draws together the arguments made in the previous Chapters in assessing the overall impact of the Acts. Subsequent proposals for changes to the criminal justice system have been couched in similar terms of defendants exploiting their rights to evade justice and the resulting need to 're-balance' the system. Arguments that, it is concluded, are theoretically and practically flawed. It is suggested that this close analysis of the CJPOA and CPIA is potentially instructive for assessing similar arguments for legislative proposals. The absence of such a thorough critique by those introducing such fundamental reforms, calls into question the very notion of 're-balancing.'

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[13] The increased pressure on suspects to disclose their case in advance of trial, the encouragement of early guilty pleas and keeping more cases at the magistrates' courts has also made challenges on human rights issues less likely.

1.2 The Right to a Fair Trial[14] and the Question of 'Balance'

> "The notion of fair trial in its application to criminal law incorporates three closely related, albeit distinct, principles. These are: that the accused be presumed innocent until proven guilty, that the State bear the burden of proof on the issue of guilt and innocence, and that the accused be not obliged to incriminate himself." (Leigh, 1997:658)

This section locates the Acts in the context of an adversarial process. Whilst the English system is broadly adversarial in nature,[15] it cannot be truly so as the disparity between the two parties could not result in a fair trial for defendants. The state has vastly superior economic and staffing resources, statutory powers to search persons and property and has the first, and perhaps the only, forensic analysis of materials. Crown Prosecutors accordingly, have a duty, not only to secure convictions, but also to act fairly.[16] Measures such as the right to legal advice (a "fundamental right of a citizen" (*Samuel*, 1988)) and the provision of legal aid have been adopted to create a situation of, what has become known under human rights jurisprudence as, "equality of arms" (*X* v *FRG*, 1963). This requires that suspects are not in a position of disadvantage to the prosecution in preparing and presenting their defence (*Foucher* v *France*, 1998; *Jasper* v *UK*, 2000).

This asymmetry has been exploited before and since these Acts by proponents of crime control[17] measures, who advocate 're-balancing' a system in which the defence receives all the 'advantages'.[18] As Ashworth (1998:30) has argued, there are dangers in the uncritical acceptance of the pursuit of balance as a worthy aim. Indeed the notion of balance is often a watchword for the ceding of basic protections for reasons of social or political expediency. A central tenet of rights discourses is that rights should not be dependent upon the subjectively defined characteristics of the recipients, particularly in an area such as criminal justice, where few suspects attract public sympathy. The criminal justice system has to command public confidence but the acquittal of the innocent rarely appears to carry as much public concern as convicting the guilty. The conventional understanding was that it was better ten guilty men should escape justice than one innocent man should suffer (*Hobson*, 1823 per Holroyd J). Recent rhetoric, however, has suggested that the acquittal of the guilty is as much a miscarriage of justice as the conviction of the innocent. This balance is critical to the structure of the criminal justice system but has not been addressed directly or systematically.

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[14] Article 6 ECHR provides defendants in criminal proceedings with certain basic rights. These include the right to: a fair and public hearing within a reasonable time by an independent and impartial tribunal; to be informed promptly and in detail of the accusation faced; to adequate time and facilities to prepare a defence; to legal assistance and to examine witnesses (6(1)). Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

[15] Whilst not a 'pure' system, it may be characterised as such by *inter alia*: the presence of an impartial judge, acting as 'umpire'; the principle of 'orality'; and the role of the advocate, presenting the evidence in the manner most advantageous to his or her client (McEwan, 1998:2-3).

[16] Even if a person is technically guilty of an offence, if the means used to secure a conviction are sufficiently offensive, that conviction will be quashed (*Mullen*, 1999. See Lord Denning, (1955) *The Road to Justice* London: Stevens at pp36-7 and the Code for Crown Prosecutors established under s10 Prosecution of Offences Act 1985).

[17] In Packer's (1968) archetypes, 'Crime Control' systems prioritise the expeditious repression of criminal conduct through police interrogation, minimal safeguards and the encouragement of guilty pleas. 'Due Process' systems emphasise the protection of individual rights and the integrity of the system by testing evidence, the presumption of innocence and providing remedies for mistakes.

[18] The same tactics were employed to introduce the jury-less 'Diplock' Courts in Northern Ireland, the Criminal Evidence (Northern Ireland) Order 1988, the Criminal Justice (Terrorism and Conspiracy) Act 1998 and recent attempts to curb the right of defendants to elect trial by jury.

Those advocating 'crime control' restrictions on the rights of suspects have used the same techniques repeatedly. The exercise of a right is condemned as manipulation of the system by unpopular groups such as 'professional criminals' or terrorists.[19] Suspects' rights are compared unfavourably to the obligations of the prosecution and the lack of rights for victims, or, in the more emotive terms usually adopted, the inability of the prosecution to bring wrongdoers to justice. Opposition is countered by the provision of minimal safeguards for 'worthy' or vulnerable suspects (Sanders and Young, 1994:197; Easton, 1998:45; Leng, 2001:112) and the repetition of the canard that the innocent have nothing to hide. Notwithstanding the dubious veracity of this "populist punitiveness" (Bottoms, 1995), the resulting legislation applies to all suspects but it does not affect them all equally. The ostensible targets of the measures are likely to have the wherewithal to defend themselves, it is the 'ordinary' or vulnerable who are most at risk. This focus on individuals, however, is to miss the damage that is done to the system as a whole.

The English criminal justice system is a complex organic entity. It is uncodified and, prior to the Human Rights Act 1998, the unwritten constitution meant that there were no formal, overarching concepts to guide or to limit the extent of any changes.[20] Instead, judges have articulated what they consider to be fundamental principles underlying English criminal law and procedure, designed to ensure that defendants receive a fair trial.[21] The right of silence was one such tenet (*Sang,* 1980); intertwined with this are the presumption of innocence and the principle that the prosecution carries the burden of proof in establishing the guilt of the accused. The right of silence and the rule that the defence had no duty to disclose its case in advance of trial were practical expressions of the principle that the prosecution should be able to prove its case notwithstanding any answer by the defendant. This requires that the prosecution disclose its case in advance of trial to enable the accused to prepare a defence. Prosecution and defence disclosure are thus oppositional rather than equivalent. The suggestion that defendants should be obliged to help either the prosecution or the system is accordingly "wrong in principle" and a diminution of the burden of proof (Zander's note of dissent to the RCCJ report, 1993:223). Disclosure of unused material is a comparatively recent obligation on the prosecuting authorities[22] but it is an "inseparable part" of the right to a fair trial (*Brown (Winston),* 1995 at p198).

The right of silence and the related privilege against self-incrimination have traditionally been viewed as "generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6" (*Funke* v *France*, 1993; *Saunders* v *UK*, 1996).[23] Contrary to the expectations of many commentators, however, the ECtHR declared that the drawing of inferences from the failure of suspects to answer police questions or from their refusal to testify, does not breach Article 6 *per se* (*Murray* v *UK*, 1996; *Condron* v *UK,* 2001) as suspects are not compelled to speak and certain safeguards must be in place before inferences

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[19] It should be noted however, that PACE does not apply to those held under anti-terrorism legislation or the Official Secrets Act.

[20] Before the CJPOA, the right of silence was "assumed and acted upon rather than specified and stipulated" (Galligan, 1988:77). For example, it was implicit in the provisions of PACE relating to the caution and in the entitlement of suspects to legal advice.

[21] Parliamentary Sovereignty means, however, that that these principles are not binding.

[22] See Niblett (1997) for a full history. He identifies the first authoritative ruling on the subject to have been *Bryant and Dickson* (1946).

[23] The privilege against self-incrimination is incorporated into the International Covenant on Civil and Political Rights (Article 14(3)(g)). Rule 42(A) Rules of Procedure and Evidence of the International Criminal Tribunal for Former Yugoslavia provides expressly that a suspect has the right to remain silent. Art. 67(1)(g) of The Rome Statute of the International Criminal Court provides that the accused is "Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence."

can be drawn.[24]

Whilst technically the burden of proof remains unchanged, these Acts are based on a presumption that reticence is indicative of guilt; innocence cannot be inferred from silence (*Murray* v *DPP*, 1993):

> "The right to remain silent is an essential part of that presumption [of innocence]. To require the accused to testify shifts the burden of proof from the prosecution to the accused. To permit the drawing of incriminating inferences from the silence of the accused dilutes the quality of the evidence required to prove guilt since the incriminating inferences permit the court to establish the guilt of the accused on the basis of evidence which might otherwise be inadequate to sustain conviction." (*Murray* v *UK*, 1996 at p52 Partly dissenting opinion of Mr E. Busuttil)

It is argued that these encroachments thus do not just change the rules of evidence; they alter the very nature of the system.

1.3 The Right of Silence: The Common Law, Research and Debate

The debate around the right of silence has a long history. The extant research and developing common law gave little support to the changes. Despite its limited protective value and the fact that it never attracted the level of public support of the American Fifth Amendment, the right of silence was of great symbolic value (Dixon, 1991a; McElree and Starmer, 1993; Leng, 1997; Easton, 1998). Such symbolism could be positive, reinforcing the principle that the burden of proof lies with the prosecution; or negative, expressing lack of trust in the police (Dixon, 1997:266). This symbolic value had been recognised as a reason for retaining the right of silence, ("Symbolic Retentionism," Greer, 1994); my research suggests that this was as much a motivation for its curtailment ("Symbolic Abolitionism").

Historically the courts took "a rather Janus-faced attitude towards the right of silence" (Jackson, 1994:270). It was not the case, as was implied by those advocating the changes, that, before the CJPOA, the courts were unable to consider a defendant's refusal to answer police questions or to testify. The Criminal Evidence Act 1898 prohibited the prosecution, but not judges, from commenting on a defendant's failure to give evidence.[25] In the earliest reported case, it was held that the extent of comment is "entirely for the discretion of the judge" (*Rhodes,* 1899 at p83). It was not possible to reconcile the judgments as to what constituted proper judicial comment (*Gilbert,* 1977). The courts appeared more willing to permit judicial comment on an accused's refusal to testify than from a no comment interview (*Bathurst*, 1968; *Mutch*, 1973; *Martinez-Tobon*, 1994). Inferences drawn from silence could not be corroborative of guilt. They could be drawn in order to weaken defence evidence or to strengthen prosecution evidence or could affect the inferences drawn from other evidence (*Sparrow*, 1973; *Mutch*, 1973). Judges had to direct juries that they could not assume that a defence was untrue simply because it was not mentioned until trial and that they should not assume that defendants were guilty because they had not given evidence (*Bathurst*, 1968). Stronger comment could then be made where the defence case involved the assertion of facts which were at variance with the prosecution evidence, or additional to it and exculpatory, and

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[24] It is argued in Chapter 5 that this "common sense" qualification fails to explore the practical effects upon the fairness of proceedings of how suspects experience, and criminal justice practitioners implement, these provisions.

[25] The Criminal Evidence Act 1898 permitted defendants to testify for the first time. It may be argued that before this date defendants had an obligation, rather than a right, of silence at trial (Wood and Crawford, 1989:5).

which, if true, would have been within the accused's own knowledge (*Martinez-Tobon*, 1994). Statutory inroads had been made into the right of silence by the requirement that the defence disclose in advance of trial, any alibi (s11 Criminal Justice Act 1967) or expert evidence (s81 PACE) it proposed to call. Significant extra powers are given to those investigating fraud and serious financial misconduct (see *inter alia*, Companies Act 1985, Insolvency Act 1986, Financial Services Act 1986, Banking Act 1987 and Criminal Justice Act 1987). These exceptions were justified because of the particular difficulties caused to the prosecution of countering such evidence without preparation. The burden of proof has been reversed in certain instances, effectively obliging the defendant to give evidence.[26] It has been suggested that provisions allowing the drawing of inferences from failure to supply bodily samples (s62 PACE) breach the privilege against self-incrimination (Easton, 1990). On a literal interpretation, this is true; there are, however, important differences between this and the CJPOA provisions. A sample of DNA or blood provides objective evidence in a standard form; the inarticulate, frightened or confused suspect will provide the same quality of sample as the intelligent and experienced. The sample is not open to 'construction' by the police,[27] nor can a false response be given.

Extravagant claims were made, in the absence of or scorning research,[28] about the extent to which suspects were (ab)using the right of silence. Extensive use of a right does not diminish its worth but in order to assess the claims made about the need for the changes, and the impact of the legislation, it is necessary to know who exercised the right and its effects upon the administration of justice. The case for creating the disclosure regime was grounded similarly in unsubstantiated anecdote and rhetoric about 'criminals' escaping justice as a result of making speculative and excessive demands for unused material and by launching ambush defences. The changes to disclosure were proposed as the CJPOA provisions came into effect. This gave insufficient time to assess how these provisions were working or whether there was a need for further changes. The mischief caused by ambush defences was unquantified and overstated by proponents of the CJPOA and CPIA,[29] which further suggests that the policies were introduced for symbolic rather than practical reasons.

Most of the research which preceded the curtailment of the right of silence, focused upon the pre-trial stage. The findings of the main surveys published in the fifteen years before the CJPOA are detailed in Table 1.[30] There is considerable variation in the findings, which show that between 1.7% and 15% of suspects remained silent. Interpretation of such data must consider when the fieldwork was undertaken, the populations sampled,[31] the definitions employed, who defined the 'no comment' incident and whether the number of interviews or the number of suspects was counted. Police officers may be more ready than researchers to classify an interview as no comment if they regard it as an impediment to their investigation

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[26] For example, s1(1) Prevention of Crime Act 1953 and s101 Magistrates Court Act 1980 or s172(2)(a) Road Traffic Act 1988.

[27] See Chapter 3. There are caveats as to the reliability and interpretation of this data but these are beyond the scope of this work.

[28] The Criminal Law Revision Committee (1972, discussed below) neither commissioned nor considered research. When told that research indicated that curtailing the right of silence would not increase the number of convictions, Home Secretary Michael Howard replied "I do not accept the research" (cited in Leng, 1998).

[29] "The spectre of the ambush defence has been perhaps the single most powerful factor in the campaign to abolish the right to silence in police interrogation and to require early disclosure of the defence case." (Leng, 1995:706)

[30] Research investigating the effects of the changes in England (Bucke *et al.*, 2000) and Northern Ireland (Jackson *et al.*, 2000) is discussed in Chapters 3 and 5.

[31] Although the court based studies will exclude cases in which charges were not brought, these studies are likely to over-estimate the use of silence. The Crown Court and CID samples are skewed towards the more serious cases for which suspects are more likely to be legally represented.

or a challenge to their authority (see Chapter 3). Brown (1994) reviewed the research to produce a 'best estimate' of the extent of the exercise of the right. He found that 5% of suspects remained completely silent to police questions and between 6% and 10% remained partially silent (14-16% in the Metropolitan Police District). Leng's report for the RCCJ (1993) was based on relatively old data (1986-88) and defined silence in terms of the proposed legislative changes. He found no evidence that the right of silence was impeding prosecutions, or that no comment interviews led to ambush defences at court.[32] The majority of those who were silent at the police station and whose cases got to trial, pleaded guilty or were found guilty. Almost half of all no comment cases led to convictions, 9% to not guilty verdicts, the rest were dropped or no further action was taken.

The Eleventh Report of the Criminal Law Revision Committee (CLRC, 1972) was the epitome of Utilitarian Abolitionism (Greer, 1994). This view can be traced back the argument of Bentham that the privilege against self-incrimination impedes "rectitude of decision" (1825). It found favour subsequently with the proponents of the CJPOA. The legislation proposed by the CLRC provided the template for the Criminal Evidence (Northern Ireland) Order 1988 and for ss34 and 35 CJPOA. The CLRC proposed dispensing with the caution, reasoning that it was illogical for the police to have to warn suspects that they did not have to answer questions and risked dissuading innocent people from advancing their account (para. 43). Terms such as 'criminal' and 'guilty' were employed casually, a rhetorical device favoured by the last three Home Secretaries. Wrongful convictions and acquittals were reduced to equivalence with 'fairness' being due to both sides (para. 27). The CLRC employed 'common sense' reasoning in its prosecutorial argument about suspects who remain silent. It is, superficially, a persuasive view but common sense is "unreliable, impressionistic and unsystematic," and therefore "a curious model for the law to follow" (Easton, 1998:114). The common sense equating of silence with guilt makes a number of untested assumptions about the 'natural' behaviour of suspects, such as the innocent wanting to defend themselves against wrongful accusations. It ignores the social, physical and emotional context within which suspects decide whether or not to exercise their right of silence. Suspects may have 'innocent' reasons for not wishing to answer police questions: such as protecting others, fear of reprisals, a desire for privacy, or hostility to the police.[33] Silence may be a response to inappropriate police behaviour or a test of the prosecution case. Suspects may be confused, distressed, intimidated, intoxicated, untruthful or unwell. They may not understand the nature of the case against them or the significance of the legal terms being used. The controversy engendered by the CLRC Report caused the effective suspension of debate about curtailing the right of silence.

The 'Phillips' Royal Commission on Criminal Procedure (1981, RCCP) was established in 1977 in response to public anxieties about rising crime rates and police malpractice.[34] The research it commissioned (Softley, 1980) suggested that the right of silence was rarely exercised in practice. The RCCP rejected any limitations upon the right of silence,[35] concluding that the right was a fundamental feature of the adversarial system, ensuring that the burden of proof remained on the prosecution. For any limitations to be fair, a more inquisitorial system would be necessary to make suspects fully aware of the police case before deciding whether to answer questions. The RCCP recommended a package of reforms in which stricter control of police detention and interrogation of suspects, most notably access to

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32 A common explanation for unanticipated defences was that the police had prevented the suspect from raising a defence at interview in order to exclude potentially exculpatory material.

33 Members of minority groups may be more reluctant to answer police questions (Moston *et al.*, 1992a; Phillips and Brown, 1998). In Northern Ireland, some Republican suspects refuse routinely to answer police questions (*Martin and Others*, 1991).

34 Concerns had been expressed following the quashing of the convictions of three teenagers for the murder of Maxwell Confait (*Lattimore, Salih and Leighton,* 1975; House of Commons, 1977).

35 Albeit on a majority decision for silence at the police station, unanimously for silence at trial.

custodial legal advice, counterbalanced the increased powers to detain and question suspects to be given to the police. Its report led to the momentous Police and Criminal Evidence Act 1984 (PACE), that first codified both parties' rights in relation to stop and search, arrest, detention, questioning and charge.

The 'crime control' backlash against PACE was immediate, reinvigorating the abolitionists to adopt a different approach. It would be difficult, although not impossible, for even the most determinedly 'tough on crime' government to resile from PACE. Despite initial hostility, ultimately most of its innovations were accepted by those working in the criminal justice system. This led Exchange Abolitionists (Greer, 1994) to argue that improvements in the contemporary investigation and trial process had rendered the right of silence otiose as a protection and an unfair handicap to the police and prosecution. It is clearly sensible to review whether a right of doubtful origin maintains its worth in a transformed system but no objective evidence showed that the right of silence was hampering police investigations or prosecutions. The confession rate has remained stable since 1992, despite the increased protection of tape-recording, the greater provision of legal advice and the marked decrease in the number of manipulative and coercive tactics employed by the police (Pearce *et al.*, 1998). The benefits of the other rights offered to suspects were assumed rather than evaluated. As is discussed in Chapter 3, many of these safeguards, including legal advice, assuming the suspect takes up the entitlement, are often of little protection. In an extraordinary example of sophistry, Exchange Abolitionists seized upon the correlation between legal advice and no comment interviews, to argue that appraising suspects of their rights meant that the actual exercise of one of the most significant rights had become unnecessary. Their balancing exercise was based upon a flawed premise as the RCCP (1981) had included the right of silence in its careful calculations. Legal advice has been repeatedly "weighed in the scales" by the courts, police and politicians when advocating measures that further restrict the rights of suspects (Belloni and Hodgson, 2000:43).

If the notion of what constitutes a fair trial has developed, it is disingenuous to manipulate the rules of evidence in order to counter such improvements. To reverse the argument, rather than allowing suspects to exploit its protections to evade justice, PACE has prevented the police from using improper techniques to secure convictions. The police have been criticised for fulfilling their obligations in a manner which frustrates the spirit of PACE (see Chapter 3). These Acts do the same: suspects appear to be in receipt of protections that fulfil the requirements of a fair trial, such as a high burden of proof and legal advice, but the protections are devalued by the quandary in which the lawyer is now placed and the potential evidential implications of a suspect's silence.

In 1987, in a speech to the Police Foundation, the then Home Secretary, Douglas Hurd, announced his intention to curtail the right of silence. The resulting Home Office Working Group on the Right of Silence (HOWG, 1989) was not asked to consider the case for curtailing the right of silence in England and Wales; it was charged only with investigating how 'best' to do so. It recognised nevertheless, the potential vulnerability of suspects and recommended statutory guidance for the drawing of inferences. It preserved the right of suspects not to answer police questions and it rejected proposals that silence should be corroborative of other evidence or should have probative value, by itself, or with other evidence, as this would shift the burden of proof from prosecution to defence. The HOWG considered that failure to mention when questioned, a fact that is relied upon at trial, may weaken a defendant's credibility but the only inference that can be drawn safely is that the fact given is untrue. It decided against a recommendation that the police should be obliged to disclose their evidence to suspects before questioning, as this could damage the case for the prosecution. This could be evaluated when deciding the strength of any inference to be drawn.

Legislation curtailing the right of silence was introduced first in Northern Ireland (Criminal

Evidence (Northern Ireland) Order 1988). The changes were based on unpublished statistics provided by the police.[36] The Order was justified[37] in terms of removing the right from those involved in terrorism or holding money from paramilitary activity (Tom King, *Hansard*, 140 H.C. Debs., cols. 183-187, November 8, 1988), despite the existing 'emergency' legislation for combating terrorism, the more limited rights of suspects[38] and the jury-less 'Diplock' Courts.[39] The enactment by means of an Order in Council rather than under prevention of terrorism legislation, meant that the changes applied to all suspects. This procedure, avoiding debate and scrutiny by Parliament, was condemned as a "constitutional outrage, and a monstrous way to proceed" (Robert Maclennan, *Hansard*, 140 H.C. Debs., col. 202).

The government's plans to introduce corresponding legislation for England and Wales as soon as the HOWG (1989) reported were rendered impolitic by the release of the Guildford Four (*Hill and Others*, 1989) and the disbanding, in disgrace, of the West Midlands Serious Crime Squad (Kaye, 1991) in the same year. This was followed by a succession of high profile Court of Appeal judgments quashing convictions[40] that exposed a catalogue of wrongdoing in the process of criminal investigation, leaving the criminal justice system in turmoil.[41] For a brief period, there appeared to be wider recognition of the vulnerability of suspects and a desire to ensure that such travesties could not recur. The government established the 'Runciman' Royal Commission on Criminal Justice (RCCJ) on the day the convictions of the Birmingham Six were quashed.[42]

It was, perhaps, surprising that a Commission established in such circumstances should have as the fifth of its terms of reference, to consider whether changes were necessary to:

> "The opportunities available for an accused person to state his position on the matters charged and the extent to which the courts might draw proper inferences from primary facts, the conduct of the accused, and any failure on his part to take advantage of an opportunity to state his position."

This represented a triumph for the police and the CPS who "viewed the Commission as a vehicle for the promotion of crime control policies" (Leng, 2001:108). The RCCJ was seen by many as a missed opportunity for radical reform (McConville and Bridges, 1994). It interpreted its terms of reference in a way that afforded equal weight to the conviction of the

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[36] Jackson *et al.*, (2000) reported that a lack of data from before the Order and the introduction of PACE in 1990 meant that it could not be established empirically whether or not the number of suspects refusing to answer police questions had changed.

[37] See J.D. Jackson (1989) 'Recent Developments in Criminal Evidence.' *Northern Ireland Legal Quarterly* 40, 105 for a background to the changes.

[38] PACE did not apply to Northern Ireland until 1990 and there was no statutory duty solicitor scheme. Those detained under anti-terrorism legislation still have more limited rights to legal advice (see Emergency Provisions Act 1996 and the Code of Practice issued under s99 of the Terrorism Act 2000). Interviews of persons arrested under s14 of the Prevention of Terrorism Act 1984 did not have to be tape-recorded. Confessions need not be excluded unless obtained by torture, inhuman or degrading treatment or violence (s12 EPA), a higher threshold than ss76/78 PACE.

[39] For trying offences 'scheduled' under the Northern Ireland (Emergency Provisions) Act 1973, (see J. Jackson, J. and S. Doran (1995) *Judge without Jury: Diplock Trials in the Adversary System*. Oxford: Clarendon Press).

[40] *Inter alia:* the Tottenham Three (*Silcott, Braithwaite and Raghip*, 1991); Birmingham Six (*McIlkenny and Others*, 1992); Maguire Seven (*Maguire and Others*, 1992); Stefan *Kiszko* (1992); the Cardiff Three (*Paris, Abdullahi and Miller*, 1993) and Judith *Ward* (1993).

[41] The titles of some of the treatise published at the time are perhaps indicative of this: *Criminal Justice Under Stress* (Stockdale and Casale, 1992); *Justice on Trial* (Thornton *et al.*, 1993); *Justice in Error* (Walker and Starmer, 1993) and *Criminal Justice in Crisis* (McConville and Bridges, 1994).

[42] 14th March 1991. Whether the RCCJ was seen as a genuine attempt at reform, or as a stalling tactic, its establishment indicated the government's recognition of the need to be seen to be doing something.

guilty, the acquittal of the innocent and the efficient use of resources. Its 'balancing' gave insufficient consideration to the vulnerability of most suspects, the inadequacies of legal representation and the occupational culture of the police. Its analysis was weakened by its failure to explore the social and organisational context within which the miscarriages of justice that led to its establishment occurred (McConville and Bridges, 1994; Maguire and Norris, 1994). No reference was made to the ECHR and the effects of the Northern Ireland Order were not considered.

The Commission adopted an atheoretical, "Instrumental Retentionist"[43] stance towards the right of silence. It endorsed the right of silence at the police station in pragmatic rather than principled terms, as an effective protection against wrongful convictions, particularly for vulnerable suspects.[44] It concluded that refusal to testify raised different issues as, once in court, defendants are protected by knowing the prosecution case and by legal representation. This does not, however, diminish the difficulties that all defendants, particularly the inarticulate, irascible, anxious or unintelligent may face when testifying in public and under cross-examination. The RCCJ recommended that, once the prosecution case has been disclosed fully, defendants should be required to answer any charges made against them or to risk adverse comment from this. Where the defendant does not give evidence, it recommended that the prosecution may question, and the judge comment, on any explanation advanced through counsel or the calling of other evidence. The jury should not, however, be invited to infer that the explanation is less deserving of belief. The absence of a principled argument by the RCCJ report, with its focus on vulnerable suspects and efficiency (in particular recommending defence disclosure) enabled the government to counter opposition to curtailing the right of silence by offering 'safeguards' to address these concerns (Sanders and Young, 1994:197; Easton, 1998:45; Leng, 2001:112).

By the time the RCCJ reported, the prevailing political climate had changed. The Home Secretaries in office during the life of the RCCJ (Kenneth Baker, Kenneth Clarke and Michael Howard) "espoused successively more extreme law and order policies" (Sharpe, 1998:86). The CJPOA, the first piece of legislation resulting from the RCCJ, marked a significant turning point in the criminal justice system. It signalled a return to the long running 'crime-control' backlash against PACE. Efficiency and managerialism, (Raine and Willson, 1993) became priorities. Despite having won a fourth consecutive general election in 1992, the Conservatives were unpopular and had, in Michael Howard, a Home Secretary who played the 'law and order' card enthusiastically. The acme of this was the announcement of his twenty-seven point 'crackdown on crime' to the 1993 Conservative Party conference, which introduced his plans to curtail the right of silence. Leng described it as "an act of appeasement of the police" (2001:132), following their vociferous opposition to the "Sheehy" Report into police pay and conditions (Greer, 1994:106). Labour, returning towards electoral popularity, was anxious to appear equally "tough on crime" (Newburn, 1995).

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[43] Some Instrumental Retentionists (Greer, 1994) accepted that the right could be traded for the perceived benefits of an inquisitorial system of justice (Blake, 1990).

[44] Two members dissented, advocating that, subject to added safeguards for the vulnerable, adverse comment should be made at trial about a suspect's failure to answer police questions.

1.4 The CJPOA Provisions

The CJPOA provisions permit comment upon, and the drawing of inferences at trial from, the failure of suspects to:

- mention when questioned or charged any feature of their defence that could reasonably have been mentioned then (s34);
- testify or, having been sworn, their refusal to answer questions without good cause (s35);
- answer questions relating to the presence of any substance, object or mark about their person (s36);
- answer questions relating to their presence at the scene of an offence (s37);

Section 34 is a partly subjective test, referring to anything the accused could reasonably have been expected to mention when questioned or charged. Silence under questioning cannot, of itself, establish a *prima facie* case, although it can contribute to one (s38(3))[45] as inferences may be drawn both in determining whether there is a case to answer and whether the accused is guilty (s34(2)). Section 34 was intended to thwart 'ambush defences' (Hurd, 1987; Howard, 1995). Whilst it extends beyond 'no comment' interviews[46] to include failure to mention any fact relied upon in a suspect's defence, it does nothing to thwart the inscrutable 'I bought it from a man in a pub' type of defence. If suspects are charged without being interviewed, they may be less likely to have sought legal representation and be unaware that the onus is on them to mention any salient facts at this juncture. This clause of s34 has received little attention but it has even less justification than drawing inferences from questioning before charge. If the police have sufficient evidence to charge, then the threat of inferences is unnecessary to facilitate the investigation process, rather it becomes a threat for failure to cooperate.

Sections 36 and 37 are concerned with facts that point to a suspect's involvement with a specified offence, rather than with any defence. Inferences can be drawn from the failure of suspects when arrested, to account for the presence of any object, substance or mark about their person, or to explain their presence in a particular place, whether or not this forms part of the defence case:

> "It is not so much the accused's failure to mention facts which could help him in his defence which is in issue but his failure to explain facts already known to the police and which point to his guilt." (Wasik & Taylor, 1995:60)

Such failure could be used as circumstantial evidence of guilt at common law (ss36(6) and 37(5) preserve this); it can now be used effectively as corroboration. For example, the suspect was not only found at the scene (common law inference) but failed to account for his or her presence there (additional CJPOA inference). Unlike s34, there is no proviso as to the reasonableness of expecting such an account. The questioner must have a reasonable belief that the presence or condition of the object, substance or mark may be attributable to the suspect's participation in the commission of a specified offence, but this does not have to be the offence for which the suspect was arrested (s36(1)(b)). The suspect must be told this,

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[45] The common law assumption remains (s34(5)), that silence in the face of an accusation by someone with whom a suspect is on 'even terms' when not under caution (such as a witness or victim), can be considered an adoption of the allegation (*Christie*, 1914). The CLRC recommended that failure to answer police questions or to testify should amount to corroboration of any relevant facts adduced by the prosecution, (a proposal adopted initially in the Northern Irish provisions but not the CJPOA). This re-opened the possibility of defendants being convicted solely on the testimony of 'supergrasses,' (*Statewatch Bulletin*, September-October, 1993), although it does not appear to have been used in such a way. The Criminal Justice (NI) Order 1996 amended this to accord with the CJPOA.

[46] The terms 'no comment interviews' and 'silence' are nevertheless used widely, and also in this thesis, as a convenient, if inaccurate, shorthand.

asked for an explanation and informed in 'ordinary language' what the effects of failure to answer the questions put to them are, (the 'special warning', Code C, 10.5B, PACE). The Sections are surprisingly restricted to the condition of the suspect at the time of arrest, and not, for example, as described by an eyewitness to the crime. Section 37 is similarly concerned only with the suspect's location at the scene of the crime at the time of arrest.

Section 35 allows the prosecution to comment if a defendant does not testify.[47] The court or jury, in determining whether the accused is guilty, may draw such inferences as appear proper from the accused's failure or refusal without good cause, to testify or to answer any question. The court must:

> "Satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence..."[48]

The parenthesis appears to favour highlighting the accused's failure to testify, rather than a concern for informing defendants of their rights. Section 35(5) creates a conclusive presumption, that a defendant who refuses to answer questions having been sworn "shall be taken to do so without good cause" unless there are statutory grounds for not replying, reasons of professional privilege, or through the court's discretion. This subsection does not refer to those who refuse to testify. Inferences may only be avoided in this situation if the physical and mental condition of the accused makes it appear "undesirable" to the court (s35(1)(b)).[49]

The Act provides no guidance in defining what inferences are 'proper.' The consequences of this are discussed in Chapter 5. The inference drawn need not be about specific facts, it may just be a general inference of guilt (Pattenden, 1995:606). Because magistrates and juries do not give reasons for their verdicts, there is limited opportunity for appeal over the exercise of this discretion[50] or for monitoring how it is used. This may also cause difficulty for the Court of Appeal, as it cannot know what, if any, inferences the jury may have drawn.

1.5 The Disclosure Debate: Ambush Defences and Fishing Expeditions?

The disclosure provisions appear to have been drafted in a legislative and historical vacuum. Those sponsoring the changes made no mention of the potential interaction between disclosure and other relevant legislation, most significantly ss34-38 CJPOA. No research was

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[47] Section 168(3) and sch. 11 CJPOA repealed proviso (b) to s1 of the Criminal Evidence Act 1898. Section 35(4) preserves the right of the accused not to testify by specifying that failure to do so does not constitute a contempt of court.

[48] The initial proposal, based on the CLRC recommendations and the Northern Ireland Order, whereby the accused would be called upon to give evidence, was amended at the report stage in the Commons following criticism from Taylor LCJ (1994) that it was "undesirable and unfair" to call upon the defendant to give evidence and "does not lie easily with the principle still intact... that the defendant has a free choice whether to give evidence". He objected to the inquisitorial element such a requirement would bring to the judge's role. Schedule 10, para. 61(3) CJPOA aligned the Northern Irish provisions with those in England and Wales.

[49] When the legislation was first enacted, the defendant had to have reached 14 years of age before s35 applied (repealed by s35 Crime and Disorder Act 1998). Inferences cannot be drawn if the accused's guilt is not in issue, although the purpose of this is obscure. Neither is it clear how the exclusionary discretion in s38(6) could be used to prevent inferences under s35.

[50] Magistrates now have to give reasons for their verdicts in compliance with the Human Rights Act 1998; *Condron* v *UK* (2001).

conducted into the issues surrounding disclosure before the changes were mooted. The police made representations to the RCCJ about the onerous burden imposed by their having to search through the unused material for any potentially relevant item, checking the contents to ensure that it could be released and then copying it to the defence. Whilst major investigations can generate enormous quantities of material, much of it useless to either side, the Law Society (1995) rebutted these claims, noting that the vast majority of cases generate fewer than 125 pages of unused material.[51] It was alleged that defence teams were undertaking 'fishing expeditions' in the hope of finding bogus but plausible defences, or information so sensitive that the prosecution would drop the case rather than disclose it (Pollard, 1994; Rose, 1996). Such accusations were never verified objectively, although some senior judicial figures endorsed them in trenchant terms. The Director of Public Prosecutions referred to the "anarchical days" of complete disclosure and described the resentment of the Legal Aid Board at the additional expenditure such practices incurred (Calvert-Smith, 2000). Lord Taylor C.J. (1994) complained about the amount of judicial time consumed by decisions about disclosure and the "grave difficulties" caused to the CPS and the courts by "the one-way traffic of disclosure by the prosecution to the defence." It seems unlikely that this was a widespread problem given the emerging literature about the routinisation of work by defence solicitors and their lack of adversarialism (see Chapters 3 and 4). Although the demands made by searching unused material in major cases may be onerous, such material might contain evidence that could exonerate a defendant:

> "In view of the numbers of miscarriages which have been uncovered by one form of fishing or another, it should certainly not be assumed that it is a tactic inimical to justice." (Leng, 1995:707)

Disclosure had undergone rapid developments under the common law. The courts appeared to have been establishing a workable solution to the disclosure problem and had not appealed for Parliamentary action as they had done with other issues.[52] The position was first formalised by the *Attorney General's Guidelines* (1982). These required the prosecution[53] to disclose unused material to the defence if "it has some bearing on the offence or offences charged and the surrounding circumstances of the case." Some discretion was reserved for withholding sensitive information. The Guidelines did not have the force of law and were revised and developed by the courts. Relevance was defined very broadly (*Brown (Winston),* 1991) and the evidential value of material became for the defence, rather than the prosecution, to determine (*Saunders,* 1991). The case of *Ward*[54] (1993) was seen variously as the "high point of the common law" (Wadham, 1997:697) or as imposing an intolerable burden on the police that was exploited by disreputable defence lawyers (Pollard, 1994; Rose, 1996). The judgment articulated emphatically the duty of the prosecution to disclose unused material:

> "We would emphasise that 'all relevant evidence of help to the accused' is not

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[51] Recent surveys indicate support for this proposition. Mackie and Burrows (2000) had difficulty obtaining quantitative data concerning time, cost, delays and discontinuances as a result of disclosure requests to third parties. This might suggest that so few requests are made, it was not thought worth recording. Pleasence and Quirk (2002) found around 90% of Crown Court files contained prosecution bundles of 225 pages or fewer; the median number of pages was 75. It may be inferred from this that most cases do not involve large quantities of documentation.

[52] Such as Lord Lane's comments in *Alladice* (1988), that the entitlement of suspects to legal advice should be balanced by the right of the prosecution to remark upon any no comment interview.

[53] 'The prosecution' was not defined and was extended by case law to include *inter alia*, forensic experts and social services departments.

[54] Judith Ward was a mentally disordered woman who 'confessed' to the police that she had planted three bombs as part of an IRA campaign, including one that blew up a coach carrying soldiers and their families on the M62 in 1974. She pleaded not guilty at her trial but was convicted on the basis of her admissions and scientific evidence. Her conviction was quashed due to the unreliability of the forensic tests and the non-disclosure of significant evidence.

> limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led." (*Ward*, 1993, per Glidewell L.J. at p25)

Ward meant that the prosecution was no longer permitted to be judge in its own cause, regardless of the sensitivity of the material. Even in cases attracting Public Interest Immunity, the prosecution had to inform the defence that it was withholding material documents. If the prosecution was not prepared to have the issue determined by the court, then the charge must be dropped. This provoked a furious reaction from the prosecuting authorities, similar to that of the Exchange Abolitionists. The courts were alert to the potential problems of the *Ward* principles[55] and modifications were made quickly. It was held in *Keane* (1994) that material must be disclosed if, on a sensible appraisal, it was judged:

1. to be relevant or possibly relevant to an issue in the case; or
2. to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution propose to use; or
3. to hold a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).

It had been suggested before the CJPOA that some form of defence disclosure would counter the perceived mischief of the right of silence by preventing ambush defences. The HOWG considered "the relevance of other measures to encourage early disclosure of the defence case." It recommended a scheme whereby, once the defence have received a statement of the prosecution case, they should respond, setting out in general terms the nature of the defence and the matters on which they take issue with the prosecution. This should include any objections to the prosecution statement, points of law or authorities upon which they intend to rely and any agreement with the prosecution over documents and other matters. Failure to comply with these requirements, or departure from the statement at trial, could lead to comment being made and inferences drawn, but should not amount to corroboration.

Although it had not commissioned any research in this area, much of the impetus for reform of the pre-trial disclosure process came from the RCCJ. This is somewhat ironic, as non-disclosure by the prosecution was a feature of most of the notorious miscarriages of justice that led to the establishment of the RCCJ.[56] The majority RCCJ report, like the HOWG, gave issues of principle scant attention, reasoning that requiring a defendant to disclose the defence that will be advanced at trial, is merely a question of timing rather than an infringement of the privilege against self incrimination (1993:98). It recommended a scheme whereby the prosecution would give the defence copies of all material relating to the offence, offender or circumstances surrounding the case, whether or not it will be relied upon at trial. With a few exceptions, the CPS should also inform the defence of the existence of any other material obtained during the course of their inquiries. Defendants should then be obliged to disclose any evidence they propose to call, in sufficient detail for the prosecution to understand the substance of the case, (a pro-forma of tick boxes was suggested). Any divergence from the defence outlined could attract comment and the drawing of inferences. Requests for further

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[55] The increase in defence applications for disclosure of informants' names and roles was noted. Lord Taylor suggested that the hitherto rare defence of duress had "suddenly become all the vogue" to elicit disclosure about informants and he warned judges to scrutinise such applications with care to ensure that such details were essential to the running of the defence: "If they are not so justified, then the judge will need to adopt a robust approach in declining to order disclosure" (*Turner*, 1995 at p97).

[56] *Maguire and Others*, (1992); *Kiszko* (1992); *Ward* (1993); and *Taylor and Taylor* (1994). The Criminal Cases Review Commission has identified non-disclosure as the third most common reason for referring convictions to the Court of Appeal (*Annual Report*, 1999-2000, para 2.4. No such details have been given in subsequent reports).

disclosure of unused material should be related to the defence submitted. The court should arbitrate where the prosecution disputes the relevance of the request or of the defence case to the main elements of the prosecution case. It considered that this would lead to earlier and better preparation of cases; weak prosecutions being dropped; earlier resolution of cases through guilty pleas or the fixing of earlier trial dates; minimisation of ambush defences; and more efficient use of court time from more accurate estimates of trial length (p97 para. 59). Zander rejected this in his note of dissent to the Report. He concluded that it is unfair to expect defendants to present their finished response to the case the prosecution sets out initially, as this frequently changes before trial. He rejected the "unconvincing" justifications and noted the lack of evidence for requiring defence disclosure. Limited disclosure was unlikely to aid the prosecution and would involve "significant extra delays, costs and inefficiencies" (p222). He thought it unlikely that the courts, considering their relaxed approach to alibi notices, would enforce the provisions.

1.6 The CPIA Disclosure Regime

The CPIA created the first formal system of pre-trial discovery in criminal proceedings.[57] It extended the recommendations of the RCCJ. Part I introduced a two-stage procedure for the prosecution to disclose unused material to the defence, contingent upon the defence, for the first time, having to disclose its case in advance of trial. Primary Prosecution Disclosure consists of any material that might undermine the prosecution case; Secondary Prosecution Disclosure is that which might support the defence outlined.[58] The disclosure regime is mandatory in the Crown Court but not in summary cases or the youth courts (s6).[59] The duties of the prosecution relate to material that it does not intend to use in court; the defence's duties to that which it does.

The responsibilities of the police for the collection, retention, documentation and disclosure of evidence are provided for in a Code of Practice[60] (s23(1)). The Code provides "a benchmark the significance of which should not be underestimated" (Corker, 1997(1):885). It requires that all reasonable steps are taken in criminal investigations and that all reasonable lines of enquiry are pursued, whether these point towards or away from the suspect (para. 3.4). Defining the primary responsibilities and duties of the police is left to the Code rather than being provided for in the legislation. In *Saunders* (1989), it was held that defendants must be entitled to presume that the prosecution will have complied with the, non-statutory, Attorney–General's Guidelines. The same reasoning could be applied to the Code of Practice. As with PACE, failure to comply with the Code does not, of itself, give rise to either criminal or civil liability, nor is it a police disciplinary offence (s26(2)).

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[57] If a case is sufficiently long or complex, s29 creates a pre-trial regime akin to that in serious fraud cases. The judge assumes greater management powers and can order prosecution and defence disclosure. This is not considered here.

[58] Notwithstanding the CPIA regime, the defence is entitled to copies of: the custody record (PACE Code C2.4); first descriptions before an identity parade (D2.0 and 2.21B); interview tapes (E4.16), stop and search records (PACE s3(7)) and documents to be used to refresh the memory in the witness box.

[59] The extent of disclosure made in the magistrates' court will have a significant impact on the justice received by 97% of defendants in criminal cases. The accused is entitled to the same safeguards designed to ensure a fair trial in the magistrates' court as in the Crown Court (*Bromley Justices ex parte Smith and Wilkins* (1995 at 288, per Simon Brown LJ)). The anomalies that exist are a significant factor in the debate surrounding the proposed restrictions on the rights of defendants to elect trial by jury. The decision in *V and T* v *UK* (1999), may increase the likelihood of serious offences being tried in the Youth Courts.

[60] Part I of the Act is phrased in non-agency specific terms ('prosecutor', 'investigator', 'disclosure officer') but Part II of the Act (which establishes the Code of Practice) applies only to police officers. Other prosecuting agencies are probably expected to have regard to the relevant provisions.

Any material that the investigator has retained must be listed on a schedule of either non-sensitive (para. 6.3) or sensitive material (para. 6.4).[61] The officer in charge of the investigation must ensure that all relevant material has been made available to the disclosure officer but there is no certification process for this crucial stage. Relevant material includes that:

> "Which has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case." (para. 2.1)

Investigators are required to seek relevant material from third parties and to ensure that it is retained (para. 3.5) but they do not have to make speculative enquiries. Draft statements do not have to be retained if the investigator does not consider that they differ from the final version, (para. 5.4). This is a "significant lacuna" (Corker, 1997(1):885), as analysis of initial statements has exposed many unsafe convictions. After conviction, all material that may be relevant must be retained, at least until the convicted person is released from custody, or six months from the date of conviction in all other cases. If the conviction is disputed, all such material must be retained until any appeal against conviction or application to the Criminal Cases Review Commission is determined (para. 5.8).

The designated disclosure officer should draw the attention of the prosecutor to any material that may fulfil the Primary Prosecution Disclosure test, explaining how that view was formed. This view of the police as impartial, inquisitorial investigators ignores the occupational culture of the police, (see Chapter 3), and the history of concealment of evidence by the police in cases such as *Kiszko* (1992) and *Ward* (1993). The prosecutor decides what, if any, of the material listed might undermine the prosecution case. The courts cannot review Primary Prosecution Disclosure. This "implies a trust in the objectivity and insight of prosecutors which experience suggests might be misplaced" (Wynn and Foster, 1996:50). It asks prosecutors to undertake a task for which they are neither suited nor trained. They cannot be expected to know what material will assist the defence. "As soon as reasonably practicable" (s13) after committal,[62] the prosecutor must provide the defence with Primary Prosecution Disclosure: a copy of the schedule of non-sensitive material and either any previously undisclosed material that might undermine the prosecution case, or a statement that no such material exists (s3(1)). The construction of the term 'might undermine' is critical to the operation of the Act. No sanctions attach to the prosecution for changing its case, or for failing to disclose information. All attempts to penalise the prosecution for inadequate primary or secondary disclosure were resisted (Baroness Blatch, *Hansard*, Lords, 18 December 1995 col. 1456). This appears to prioritise administrative convenience above the interests of justice and gives the prosecution a substantial advantage over the defence. It does not matter how poor the prosecution disclosure is; so long as something is produced, the defence is then obliged to submit a statement.

Defence Disclosure requires the accused to submit a defence statement to the court and to the prosecutor within fourteen days[63] of Primary Prosecution Disclosure (a "ludicrously tight

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[61] If material is of exceptional sensitivity, it may be omitted from the schedule and disclosure made between senior police and CPS staff (para. 6.13).

[62] Or transfer to the Crown Court, inclusion of a s40 offence on indictment or preferring of voluntary bill (s1(2)) until such time as the Home Secretary defines a period (s3(8)).

[63] The defence may apply in writing to the court for a specified extension of time if there are reasonable grounds for exceeding the time limit (SI 1997, No. 684 Reg. 2 and 3). The application must be made within the time limit, but no decision will be made until after it has expired. Whether Primary Prosecution Disclosure is considered to be made on postage or on receipt of the schedules, is potentially significant as penalties may be incurred for serving the defence statement outside the fourteen-day period. The formal notice issued with primary disclosure now states that the period

deadline" (Corker, 1997(2):961)). This must set out in general terms the nature of the defence, indicating on which matters issue is taken with the prosecution and why. Full details of any alibi evidence must be provided (s11 of the Criminal Justice Act 1967 is repealed by s74 CPIA). The statement may not set out inconsistent or alternate defences. If a defendant fails to provide a statement, submits it late, sets out a defence at trial that is inconsistent with it, or calls alibi or witness evidence that was not detailed in the statement, then the court or any other party[64] with leave of the court, may make such comment as appears appropriate (s11(3)(a)). The court or jury may draw such inferences as appear proper when considering their verdict (s11(3)(b)). Unlike the CJPOA provisions, the CPIA offers guidance as to the drawing of inferences. Section 11(4) provides that the court shall have regard to (a) the extent of the difference in the defences and (b) whether there is any justification for this. The Act ignored the recommendation of the RCCJ (1993:98) that any defence disclosed should not be presented to the jury until the defence, or an alternative, is advanced at trial. This could be of significant benefit to the prosecution in cases in which it has to prove the *actus reus*.[65] The prosecution may use the defence statement to identify and address any gaps in its case, legitimately or otherwise. All defendants pleading not guilty are expected to submit a defence statement, there are no protected categories, such as for those defendants who are unable to recall relevant events or who are incapable of formulating a defence statement. It was left to the courts to determine how specific defence statements must be.

Secondary Prosecution Disclosure can be made only once a defence statement has been issued. The prosecution cannot 'volunteer' secondary disclosure. There is no judicial discretion to order prosecution disclosure where it is in the interests of justice to do so, such as for unrepresented defendants, or for those who may be unfit to plead. The investigator should review the unused material to advise the prosecutor of any material that supports the stated defence. The prosecutor must respond to the defence with any undisclosed material that might reasonably be expected to assist the stated defence, or by providing a written statement that no such material exists. On a literal interpretation of the provisions, there is no obligation for the prosecutor to disclose material that might assist a defence that has not been listed in the defence statement (such as provocation rather than self-defence). If the accused has not made a defence statement, then, following the distinction that must be made between material undermining the prosecution case and material supporting any defence, there is no duty for the prosecutor to disclose the latter. Unlike Primary Prosecution Disclosure, this is an objective rather than subjective test and is thus potentially subject to review under s8.[66] The defence will have to satisfy the court that they have "reasonable cause to believe" (rather than suspect) that material exists which "might reasonably be expected to assist" the case set out in the defence statement. The prosecution has a continuing duty to disclose (s9). Prosecutors and investigators have an ongoing duty to keep the unused material under review. In the context of the workloads and case management procedures of the police and prosecution, this seems unlikely to happen. Unexpected issues may arise when the trial begins which may make previously unused material relevant; for example if witnesses change their accounts or raise new issues. The disclosure officer is unlikely to be aware of issues raised by the defence during the progress of the case.

The CPIA provides exceptions to the disclosure rules. Material that has been intercepted under a warrant issued under s2 Interception of Communications Act 1985 must not be disclosed. The Act also preserves "the rules of common law as to whether disclosure is in the

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begins from the day the letter is sent.

64 Such as, a co-accused or the prosecution.

65 For example, a defence statement in an assault charge claiming self defence could be introduced to establish the defendant had hit the victim. The *Attorney General's Guidelines* (2000) instructed prosecutors not to adduce the statements as evidence in this way (para. 18).

66 It has been suggested that providing such a limited power of review for the courts was an implicit criticism of judges for disclosing material too readily to the defence (Law Society 1995, para. 25).

public interest" (s21(1)). Prosecutors can apply to the courts to order that material must not be disclosed on the grounds of Public Interest Immunity (ss3(6), 7(5), 8(5) and 9(8)). The defence can apply for a review of that order (s14(2) and s15(4)) and the court must keep the issue under review (s15(4)). If the court orders some extent of disclosure, the prosecution can then choose either to disclose the material (s14(4)) or to drop the case (s15(6)). This provides another example of hyperbole pushing reforms, as the 'menace' described by the police, of prosecutions being dropped following court orders to disclose sensitive material, was left largely untouched by the CPIA.

Opposition to the CPIA was countered by the argument that defence disclosure required little more from suspects than the incursions into the right of silence made by the CJPOA. This is not the case. If a defendant does not call evidence and merely puts the prosecution to proof, no inference could be drawn under s34 of the CJPOA but s11(1)(a) CPIA provides penalties for failure to provide a defence statement. This erodes the privilege against self-incrimination and demonstrates how defendants now risk being punished for not cooperating at their trial; a theme that recurs throughout this analysis of the CJPOA and CPIA provisions. It was, however, the conflation of defence and prosecution disclosure that has proved most dangerous.

1.7 Conclusion

This chapter provides the framework against which the CJPOA and the CPIA will be evaluated. It describes the essential concepts against which, it is argued, these provisions offend (the privilege against self incrimination, the presumption of innocence and the principle that the Crown must discharge the burden of proof). It criticises the calls for balance, made by advocates of crime control, as inappropriate in an adversarial system. This rhetoric has been used repeatedly to introduce legislation that encroaches further upon the rights of suspects. The analysis of the debates, research and developing case law suggest that the motivation for these Acts was political grandiloquence rather than practical imperative. There was little empirical support to suggest that no comment interviews, unreasonable requests for prosecution disclosure of unused material, ambush defences or the refusal of defendants to testify were causing undue difficulties in the administration of justice. There was, however, a wealth of evidence that suggested the protections offered to suspects, in particular the right to legal advice at the police station, were of limited practical effect. The effects of these provisions are addressed in the subsequent chapters incorporating the findings of the research I conducted with a range of criminal justice practitioners, the details of which are described in the next Chapter.

The zeal of the government to curtail the right of silence can be characterised as Symbolic Abolitionism. This attitude, marked by a disregard for research or for the principles underlying the system, also underpinned the CPIA and has come to pervade criminal justice policy making. The danger of such an approach is that, in the face of a continued need of governments to be seen to be tackling crime, subsequent gestures have to be bolder. Each development pushes further the boundaries of what is acceptable. This is illustrated by the circularity of the introduction of the CJPOA and CPIA. The 'instrumental' endorsement of the right of silence by the RCCJ, enabled the government to counter the objections of the RCCJ by providing safeguards for the vulnerable in the CJPOA (one of which, the requirement that s35 did not apply to the under 14s was later withdrawn). The CPIA was then introduced, with opposition rebutted on the basis that defence disclosure required no more of defendants than the CJPOA. The 'balancing' requirement of prosecution disclosure that was also introduced was a significant development that, it is argued, has created very real dangers for suspects. The proposed changes to 'double jeopardy', limiting the right to trial by a jury, and allowing jurors to know about a defendant's previous convictions demonstrate how

previously untouchable principles have become targets to demonstrate the unflinching commitment of successive governments to tackling crime. The right of silence had a distinguished history "as a 'bench mark' of British justice" (Jackson, 1991:415); its curtailment became the benchmark for crime control measures.

Chapter 2: Methodology

The arguments for and against both the CJPOA and the CPIA, discussed in Chapter 1, were rehearsed exhaustively during their respective passages through Parliament. Much was written about the theoretical implications of the Acts. Extravagant and often unsubstantiated claims were also made, on both sides of the debate, as to what the changes would mean in practice. The menace of the right of silence and the abuse of the disclosure provisions, as alleged by proponents of the changes, far outweighed the reality of their use. I sought to explore why these issues had such resonance and to identify the effects that the legislation has had in practice. The rhetoric used in favour of the Acts about 're-balancing' the system, assumed rather than evaluated the benefits of the other rights, such as legal advice, offered to suspects. Opponents of the Acts claimed that they would increase the risk of wrongful convictions. Non-disclosure of material was a significant feature of the miscarriages of justice[1] that led to the establishment of the RCCJ (1993), yet neither the government in its consultation document about disclosure (Home Office, 1995), nor the RCCJ sought to analyse why wrongful convictions occur or how the common law had developed to prevent this. Although individual cases are not the focus of this thesis, as most cases are disposed of without a trial, research into sources of miscarriages of justice is required "that examines the realities, pressures and sources of error at each stage of the criminal process" (Ashworth, 1998:52). I set out to explore the practical and cultural changes the legislation has made to the manner in which the various groups work and how their respective *modus operandi* have influenced the practical implementation of the statutes (Leng, 1999:230). I conducted 100 interviews in total: 26 legal representatives, 26 prosecutors, 17 police officers, 16 barristers, 6 clerks to the justices, 5 lay magistrates, 2 stipendiary magistrates, and 2 judges. I received 100 completed questionnaires from police officers.

2.1. Choice of Methods

A straightforward quantitative analysis, for example, comparing the progress and outcomes of cases in which a no comment interview was given with those in which the suspect answered police questions influenced the early development of the project. Such a study would have been logistically difficult to implement, particularly working alone. It would have required greater involvement from the police than I was able to negotiate and obtaining comparative data from before the Acts would have been problematic. Quantitative analysis, whilst important, is also too blunt an instrument to investigate fully the symbolic and practical effects of the legislation.

Qualitative methods offered the opportunity for a more exploratory approach. An understanding of the roles played by the protagonists within the criminal justice system is crucial in understanding how and why the legislation had the impact that it has. The Acts run counter to much of what was known about the occupational practices of those involved. In addition to indicating the empirical effects of the Acts, qualitative methods can suggest reasons for these effects. For example, statistics might reveal that legal advisers rarely advise their clients to give no comment interviews but qualitative methods make it possible to probe why this is so and why some advisers never advised their clients to remain silent even before

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[1] These "catalytic cases" (Ashworth, 1998:11) inform but are not the focus of this thesis. They were atypical cases: high-profile, contested, Crown Court convictions that were appealed, unsuccessfully at first. (Non) disclosure was a significant feature of many of them; the right of silence was not. The systemic and cultural features are, however, significant and are explored throughout.

the legislation was passed. Qualitative methods could also unearth unexpected consequences of the legislative changes, such as changing police practices regarding the disclosure of information to legal advisers before interview. It is impossible to investigate quantitatively factors not already known to the researcher, whereas the more reflexive nature of some qualitative methods allows new ideas to be generated and pursued throughout the investigation. As the CPIA provisions require such subjective judgments by prosecutors and investigators, which are not necessarily documented, this necessitated a more exploratory approach than quantitative methods alone could provide.

Potential qualitative options included observational studies or interviews. Observational studies offer the chance to see what 'really' goes on, as opposed to what respondents say happens. Such methods are very labour intensive. The relatively low numbers of no comment interviews, and of defendants not testifying meant that working alone would have made it difficult to come to any significant conclusions. Negotiations with the police over access took until the third year of the project to resolve, which would have been too late to commence such a study. Shadowing legal advisers would have provided a skewed sample as only a minority of suspects is legally represented at the police station. As there is such variation in practice between solicitors, with the small numbers that I could have followed, the results would not have been particularly representative or meaningful. Such a method would not have been appropriate for studying the effects of the CPIA as responsibility travels between the police, prosecutors and counsel and much of what happens is either written or occurs informally.

A programme of semi-structured interviews with a range of criminal justice practitioners appeared to be the most appropriate research tool for testing the claims made about the legislative changes and to uncover further issues. Comparing the responses of the different groups: police officers, solicitors, legal executives, Crown Prosecutors, magistrates, (lay and stipendiary), court clerks, barristers and judges would provide as complete a picture as possible of the effects that the legislation has had upon the investigation and trial process. These findings could also offer insights into wider issues in the criminal justice system, such as the adversarialism of legal advisers and the police. It was not possible to interview those who ultimately make the decision about whether to answer police questions or to testify at trial, namely the accused. To include all suspects, even those who are not charged, the interviews would need to take place at the police station and gaining co-operation from the police was an arduous process. Neither was it possible to interview those who decide what, if any, inferences to draw, as research into the decision making of juries is prohibited.[2]

Questionnaires can be designed in either a quantitative or a qualitative format. They provide the opportunity to survey the experiences of large numbers of people, offer anonymity, the chance for considered responses and freedom from interviewer bias but they usually have low rates of return. In order to increase the likelihood of questionnaires being returned, they need to be kept short and easy to complete. This would exclude so much relevant data that such an approach could be of only limited use. I decided to use questionnaires with the police as a 'booster' to the relatively limited number of interviews that could be conducted.[3]

The exercise of the right of silence is greater in London than elsewhere (Baldwin and McConville, 1981; Brown, 1994). There are wide inter and intra-regional variations in the numbers and types of crime committed and in local legal cultures and practices (Evans and Wilkinson, 1990; Wilkins and Addicott, 1997; Flood-Page and Mackie, 1998). Local variations in practice seem particularly likely before the case law develops. This suggested the merits of exploring how the provisions were interpreted and utilised in one region. The

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[2] Section 8 Contempt of Court Act 1981.

[3] Copies of the interview schedules and the questionnaire are appended to this thesis, together with a summary of the programme of interviews.

findings from such a microcosm can be extrapolated beyond the issues of silence and disclosure to inform what is known about the dynamics of the system and performance of these groups generally, such as the working relationships between the police and CPS. Those findings that are specific to that region may be identified by the interviewees, by comparison with other research, or from the small number of interviews that I conducted from outside the area to 'pilot' the interview schedules. There may be variation within the region also. The area chosen, Region X, is a large, predominantly urban, multi-racial area, outside London. The police requested that it was not identified. Locations within the region are described by the police Operational Command Units (OCU). The region is divided into nine areas (shown by a letter), each containing two or three OCUs (distinguished by a number). Most interviews took place in A, (a large town with a second tier Crown Court), B, (the major city in the region with a first tier Crown Court) and C, (a smaller city with a third tier Crown Court).

Each interviewee was allocated an identifying code. The first part of each code describes the interviewee's job: Bar(rister), Sol(icitor) LE, (legal executive), a (P) indicates that the legal executive is a former police officer. Police officers are labelled according to rank, DC, PS etc., as are Executive Officers, Principal, Branch or Senior Crown Prosecutors. The other titles are self-explanatory (JP, clerk, judge, stipe). The second part of the label shows which OCU the person works in (A-J). The number distinguishes the respondents. For legal representatives, it shows the firm that they work for and the final Roman numeral differentiates between respondents from the same firm. The questionnaire responses are prefixed with a Q followed by the officer's rank, if known, and an identifying number (1-100).

Towards the end of the third year of this project, one of the police officers I interviewed offered to collate some statistics relating to the incidence of 'no comment' interviews. Recordings of police interviews with suspects are transcribed, often in précis, by civilian staff. The interviewing officer completes an accompanying form, highlighting the salient points in the interview that must be transcribed verbatim. One of the categories on this cover sheet is whether a 'no comment' answer has been given to a significant question. Over a two month period, this officer arranged for the typists in his station to record the total number of interviews they transcribed and those in which the officers had indicated that there had been a significant refusal to answer questions. I requested that this be repeated at an area wide level, again for a two-month period. It is only the more serious, contested proceedings for which such transcription takes place and the classification is made by the interviewing officer. Both of these factors are likely to lead to an over-estimation of the incidence of no comment interviews and legal representation. This provided quantitative data which was useful in its own right and against which the answers from the interviews and questionnaires could be compared, (a triangulated methodology). It also provided interesting data about legal representation and revealed intra- regional patterns.

2.2. The Process of Negotiating Access

Negotiating access to carry out this research was a lengthy process. I began by approaching personal contacts of colleagues for interviews; 4 solicitors and 1 barrister (at one of the two sets in Town 'A') were recruited in this way. I used a 'snowball technique' of making the closing question in all interviews a request for suggestions as to who else to ask for an interview and whether I could use my respondent's name when contacting the person suggested. This provided a few introductions, including to a full time disclosure officer and the police area training officer. It also yielded some important contacts that I would not otherwise have known to approach, such as legal support services. I obtained interviews with the legal representatives I met when I attended City C Crown Court with the CPS and one I met at an academic function. The remainder was recruited by means of an introductory letter, setting out the aims of the project, and requesting an interview. All but two of the interviews

were conducted at the interviewees' workplaces. Most interviews were conducted on a one to one basis. Occasionally, and only at the subject's suggestion, a colleague of theirs would join us.

There were too many solicitors firms offering crime as a service to approach all of them. I chose instead a sample of 20 firms, mostly from Town A and City B. This was the largest number that I could realistically undertake working alone and was large enough to provide a spectrum of firms in terms of size and degree of specialism. A few solicitors had mixed caseloads and the firms ranged in size from a one-person organisation to multi-site firms with criminal departments. The partner responsible for criminal work was sent a personalised letter outlining the research and requesting an interview of approximately 45 minutes with a fee-earner who represented clients at the police stations and drafted defence case statements. Interviews were conducted with 26 legal representatives from 16 firms, (I visited 3 branch offices of one firm), including 1 solicitor support agency. 18 were solicitors and 8 para-legals, 5 of whom were former police officers. The solicitors interviewed were predominantly experienced practitioners (12 seniors compared to 6 more junior solicitors). In three firms, I interviewed only legal executives. These were the first interviews to be conducted, all but one of the interviews with legal representatives being undertaken in 1998.

I wrote to the 13 heads of the criminal section of barristers' chambers in City B requesting an interview with a criminal practitioner. 15 interviews were conducted at 8 sets. In five chambers, only one person was interviewed but the others volunteered two or three participants. The barristers interviewed ranged in seniority from a junior of one year's call to a Queen's Counsel; three sat as recorders. Most had a wholly criminal caseload; one specialised in sex offences and one in fraud. Only two undertook primarily defence work, the rest leant towards prosecution or did a mix of both. With the exception of the one interview conducted at a Chambers in Town A, all interviews with barristers were conducted during the first half of 1999.

The Chief Clerks to the Justices of all 10 magistrates' court in the area were written to, requesting an interview with one of their clerks and a magistrate. One refused to participate on the basis that there had not been any case involving argument about the right of silence in that court. Another said that they came under the auspices of another court and two chief clerks did not respond. Interviews were conducted at 6 courts with 7 magistrates, 2 of them stipendiaries,[4] and 6 clerks. All but one of these interviews took place between April and June 1999.

In order to increase the likelihood of persuading people to participate in research, it has been suggested that the researcher has to demonstrate how the research will be of benefit to the participant (Broadhead and Rist, 1976:327). There was a fairly high response rate from those contacted, notwithstanding the lack of obvious return to participants. Possible reasons for this include an interest in the topic, curiosity about what other professionals were doing, or feeling flattered that their opinions were being sought. This is an emotive subject for most people involved in the criminal justice system. Some interviewees no longer saw the right of silence as a significant issue (interviews were conducted between two and four years after the provisions came in), which makes it interesting that so many agreed to take part. By the time I interviewed the barristers, disclosure had become a highly contentious issue and many felt very strongly about it. It has been suggested that solicitors enjoy the rare opportunity to reflect upon their work or more general legal matters (Mungham and Thomas, 1981:91). This would seem as likely for other members of the criminal justice system. Respondents would sometimes take the opportunity to raise other issues that they felt strongly about, such as the practice of overcharging to improve crime statistics, perhaps thinking that these issues would

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[4] Stipendiary magistrates were renamed 'District Judges' under s78 Access to Justice Act 1999. They were stipendiary magistrates when this research was undertaken and are referred to as such throughout.

then gain attention.

It was more difficult to get access to the official agencies. The first approach was made to the official 'gatekeepers' in writing, setting out the aims of the project and the access required. The letter also said which other organisations had been approached or, later on, those which were participating, in order to reinforce the credibility of the research. Gaining permission from the Lord Chancellor's Department to interview judges was a lengthy but relatively straightforward process. A copy of the research plan was requested, including the aims, objectives and methodology of the project and a list of the questions, or topic areas for discussion. This was forwarded "to senior judiciary for consideration." Two circuit judges were then nominated by the Office of the Lord Chief Justice to be interviewed. These interviews took place at the end of 1998.

There were several hurdles to overcome in negotiating access with the Crown Prosecution Service. Long delays were caused by staff shortages, policy changes and having to obtain security clearance. The CPS imposed by far the most stringent conditions on the research of any of the participating organisations, requiring the completion of a 'Character Assessment Questionnaire', the signing of the Official Secrets Act and an agreement to show them anything written about the organisation before submission or publication. They retained the right to "edit or otherwise restrict publication of any such information." This caution did not seem to extend to the staff interviewed, most of whom were very forthcoming. The CPS gave permission for me to spend a week at each of three branch offices in the region, Town A, City B and City C, to interview staff and to examine files. It was ultimately not possible to visit the City B branch due to their staff shortages. The CPS interviews were the most demanding. Over two, one-week placements, I conducted up to six interviews a day and attended court and the police station. There was no opportunity to transcribe the data or to reflect upon the schedules in between interviews that were often conducted in a busy office, between meetings or court appearances. Branch A only found out on the Friday that I would be visiting on the following Monday, which meant that the interviews had to be arranged on a very *ad hoc* basis, although the office manager contacted staff on my behalf. In Branch C, I had to approach people as they worked, explain about the research and ask them for an interview. This was difficult when it was apparent how busy they were. 14 interviews were conducted in Branch A, (2 Branch Crown Prosecutors, 1 Principal Crown Prosecutor, 7 Senior Crown Prosecutors and 2 Executive Officers). 12 interviews were conducted in Branch C, (2 PCPs, 6 SCPs and 4 EOs). These interviews took place in Autumn 1998.

Given the support of the police for the changes to the right of silence and the key role that they have in the operation of the silence and disclosure provisions, it was crucial to the research that their views were represented. Whilst waiting for the police to consider my proposal, I wrote to the Association of Chief Police Officers (ACPO), the regional and national Police Federation, the Superintendents' Association and the press office of the police service being studied asking for their comments about the legislation. The regional Federation office provided a spokesperson to be interviewed and ACPO sent me some useful information. The national Federation and the Superintendents' Association did not reply. After the police had turned down my initial proposal, (based on a quantitative approach to no comment interviews), I wrote again to the Research Section of Region X with my revised proposal. This stated that, in the light of their comments, my proposal had been substantially re-written in order to occupy less officer time and no longer required access to custody records. The new proposal requested interviews with thirty officers, (the largest feasible number) and issuing questionnaires to one hundred officers. This proposal was also turned down on the grounds that the service was assisting with a large-scale Home Office project on another topic. I believed I had established a good relationship with some of the staff in the Research Section so I contacted them again, asking for their suggestions as to how the proposal could be refined, in terms of the scale of the project rather than the questions to be asked, so as to make it acceptable. I suggested foregoing the questionnaires or delaying the

research until after the Home Office work had been completed in order to minimise the inconvenience to the officers. The research staff were very helpful as they thought that the project was of merit and they liked the way in which it had been outlined. Further discussion revealed that the resistance was coming from officers on the ground who were suspicious of the topic as they felt that it was "a political hot potato." Their wariness may have been exacerbated by a previous research project that had resulted in adverse publicity in the local press. It was suggested that a reference from the Home Office might establish my research credentials. David Brown of the Home Office Research and Statistics Directorate, with whom I had previously discussed my work, kindly wrote a letter of support. I also wrote to the Chief Constable and he agreed that the research should be supported. The only pre-conditions placed on my research were that the service should not be identified and that they should see a copy of my findings. The Research Section was very helpful in terms of arranging access and providing practical support by copying and distributing the questionnaire. They also arranged to collect statistics on no comment interviews for me as described above.

It was agreed that I could conduct 30 interviews across three Operational Command Units at 3 stations in City B and 2 stations in Town A, and that 300 questionnaires, would be distributed across the area. It ultimately proved difficult to arrange so many interviews, so I spent a day at each of 2 police stations. (I interviewed 9 officers at Station A2: 3 sergeants, a custody sergeant, a detective sergeant 2 detective constables and 2 police constables. At Station B3, I interviewed a DS, 2 DCs and 2 PCs). I briefly visited 3 other stations where I interviewed 1 disclosure officer (H3) a custody sergeant (F2) and officers in a criminal justice unit (B2). In total, 17 interviews were conducted. At Station A, the officers had been chosen to talk to me and came to visit me in an office. In Station B, I was introduced to one CID officer; I then had to ask each interviewee to introduce me to someone else. This was more difficult as there were not many detectives in the office and they were reluctant to take me to meet the uniformed staff. Not all of those interviewed had experience of disclosure or no comment interviews, some were working on special projects, traffic offences or were currently restricted to desk duties.

As a homogenous, 'closed' organisation, the police might be expected to be the most resistant to being interviewed by an 'outsider'. Fox and Lundman (1974:53) discuss the two 'gates' to access within police organisations. The initial hurdle is gaining the support of senior managers; the second, winning the co-operation of the rank and file who are the subjects of the research. Permission from the authorities by no means guarantees the co-operation of those lower down the ranks (Shaffir, 1991). If the research addresses an issue that is of greater sensitivity to officers on the ground than to the senior officers who gave their consent, there may be "retrenchment from below" (Brewer, 1993). Many officers in Station B were reluctant to be interviewed, particularly on tape, and one officer refused to speak to me. There was a possibility that officers might see the research as an attack on them as the arguments against curtailing the right of silence tend to focus on miscarriages of justice, (which would accord with the "political hot potato" comments.) The only measures that could be taken against this were to reiterate at the beginning of each interview that I did not have a pre-conceived agenda and that I was interested in their views of the impact of the legislation on their working practices and tackling crime. Questions were asked about their colleagues' practices in response to suspects who make 'no comment', rather than just their own practice, in an attempt to make the questioning appear less threatening.

2.3. Interview Content and Structure

Qualitative research has been described as an interaction in which the informant is the expert, (Taylor and Bogdan, 1984); this is doubly apposite when interviewing elite populations or the "locally powerful" (Bell, 1978). Having one's working practices scrutinised may be, by its

nature, stressful but very few interviewees were obviously uncomfortable with the process. Semi-structured interviews may be the best way of creating and maintaining rapport with these groups. They are less likely to be intimidated by the interview process as they are articulate, used to being asked for their opinions and may enjoy the attention being paid to them (Mungham and Thomas, 1981:90; Smigel:1958-9). There are specific challenges presented by interviewing groups who are trained advocates, and who belong to a profession with an idealistic ethos. A structure is necessary to prevent them dominating. One of my pilot interviewees cautioned me against "dodgy, waffly lawyers' answers!"

The drafting of the questions is critical as such professionals will be alert to mistakes or a lack of preparation and will judge the researcher accordingly (Mungham and Thomas, 1981:90). The criminal justice system is a closed community. Its members require specialised knowledge and training; each group has its own ethos and the procedures are often incomprehensible to a lay observer. Adopting the phraseology of the respondents was a means of establishing rapport (such as asking how often clients went 'in the box' rather than how often they testified at trial). Mungham and Thomas (1981:85) suggest that a useful technique when interviewing lawyers is to display some previous knowledge of the area ("We have been told that" or "We have often heard that..."). This was useful in relation to some issues that had been raised in the literature but did not seem to occur in practice, such as "non verballing" (see Chapter 3).

The questions were drafted initially on the basis of issues raised in previous research conducted into the right of silence (Leng, 1993; McConville and Hodgson, 1993); police interviews (Bottomley *et al.*, 1989 and 1991; Gudjonsson, 1992); analyses of the CJPOA (Card and Ward, 1994; Wasik and Taylor, 1995); and the CPIA (Leng and Taylor, 1996; Card and Ward, 1996). These works highlighted the major issues of concern and possible ways in which the legislation might be (mis)used. The ethnographies of some of the groups being studied (Young, 1991; McConville *et al.*, 1994) helped to inform the questions and to locate the findings in the broader criminal justice context. I tested all of the interview schedules, apart from the Crown Prosecutors', on interviewees from outside the area. The pilot interviewees were also asked their views of the appropriateness of the questions and for further areas that needed exploring. Not testing the CPS schedule caused problems as I had not known that in Region X, work is divided between Crown Prosecutors, who present cases at the magistrates' courts, and executive officers (EOs) who prepare cases for the Crown Court and assist the barrister presenting the case. Crown Prosecutors are supposed to oversee the work of EOs but the extent of this supervision, and consequently their knowledge of the impact of the provisions at Crown Court, is variable. This meant amending these questions during the interviews.

All the interview schedules followed broadly the same pattern. Solicitors required the longest interview schedule as they have a potential involvement with cases from the police station, through the magistrates' court to the Crown Court. The other groups deal with discrete sections of the criminal justice system and their schedules were correspondingly shorter. The issues were similar on each schedule but tailored according to the respondent's role so that the answers could be compared and tested against those from other groups (such as asking both legal representatives and the police how often legal advisers intervene in interviews). Each interview began with a preamble about the research as, in cases where the respondent had been nominated by their senior partner or manager to be interviewed, they knew little about it. This synopsis gave respondents a chance to appraise me and to set a framework for the interviews in order that they would not think that the scene setting questions were unfocused or irrelevant. I explained that the aim was to see whether *or not* the legislative changes had made any difference. If this had not been reiterated, then the respondents might have assumed that I was only interested in finding out about dramatic changes and tailored their answers accordingly. Some lay respondents, (magistrates, executive officers and police officers) appeared unsure about the nature of the provisions. This became apparent with the

magistrate on whom the questionnaire was piloted so I amended the preamble to include an explanation of the provisions. The interviews began with a general, straightforward question such as, "Could you tell me about the firm" or "What does your job entail?" This was partly to provide a frame of reference for interpreting their answers to subsequent questions and also to help them to feel more comfortable talking to me.

The main body of all the interview schedules asked about the silence provisions followed by the disclosure regime. The questions were kept as short and direct as possible. If more detail was necessary, then supplementary questions or prompts were used. As is standard practice in interview design, the early questions were quite general ("what did you think of the changes"), becoming more specific, ("how often do you advise / encounter a no comment interview"), working through the procedures the person would consider sequentially (police questioning, charge, trial). The disclosure section was similarly "funnelled". The legal advisers' interviews first concentrated on police station work rather than the right of silence. This was designed to make them think about the environment in which they might have to advise a suspect to make no comment ("priming"). These questions also gave an opportunity to gather contextual data and provided a point of comparison with the views of the police and the police statistics ("triangulation"). This section yielded a great deal of useful background information about the firms, such as those that delegate the police station work to agencies staffed by former police officers and those that keep the work in-house. The concluding section was designed to bring the interview to a natural close, finishing with an easy question and moving the focus away from the respondents ("closure"). It would have been useful to have asked further questions about the allocation of work within the firm (such as who undertakes the Crown Court work) but this risked making the schedules too long and unfocused. Initially, I followed the questionnaire closely. As I gained in confidence and became more familiar with the process, it became more of a topic guide. This meant that if a respondent began to talk about, for example, disclosure before any questions had been asked, we would continue with that or something that they had mentioned before the interview began. Due to the logical structure of the questions, respondents would often answer the next question without it needing to be asked.

There is an inherent difficulty in asking people to quantify how often they do something. Interview subjects tend to want to give a definite answer rather than a 'don't know'. The questions were designed to help focus their recollections by asking how many times in the last month they had come across cases involving silence, as it is easier to remember across a short time period. Silence cases were unlikely to have been significant enough to make them memorable, although if representatives rarely advised silence, then their memories might be more accurate. It is probably safe to accept the 'never' answers at face value. The other answers should be interpreted with a greater degree of latitude, especially of those who expressed difficulty before arriving at a figure. Respondents may have over-estimated as they knew that these cases were of interest. Solicitors could have been expected to over-estimate the number of times they advised silence to reinforce the adversarial rhetoric many of them used, but this was not the case. This might indicate that these answers could be treated with some degree of confidence. Distinguishing what respondents do from their rhetoric or answers about what they thought they should do required some persistence; probes such as "when did you last do that" or "how many times a week do you go to the police station" unearthed some interesting discrepancies.[5]

Those working in the magistrates' courts had little practical experience of utilising the silence

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[5] One such example was the solicitor who began by saying that he tries to do the majority of the police station work in his firm. When asked how often this meant he visited the station he replied: "If it's daytime, someone else will go out and do it for me because I'm usually in court and if it's evenings, I've usually had enough and will get someone else to do it." The eventual figure arrived at was just two or three times a week (Sol/A12/ii).

provisions and almost none of the disclosure provisions. The early interviews with solicitors took place before they had had much experience of the disclosure provisions. This may mean that their answers need to be treated as having been made to hypothetical questions, which is a less reliable source of information than reports of experience. Most Crown Prosecutors had nothing to do with pre-trial disclosure and did not encounter many cases where silence was an issue but were readier to comment on the implications of these changes than the EOs were in interview.

The interviews were transcribed verbatim throughout the course of the research. I transcribed most of the tapes myself which, although time consuming, gave me the opportunity to review and reflect upon my questioning and management of the interviews and how well the questions worked. Where I had secretarial help, I listened to the tapes whilst reading the transcript to review these interviews. Adjustments were made to the questions over time if better ways of expressing the questions or new issues emerged that needed exploration, such as levels of police disclosure of information to legal advisers before interviewing suspects. One question to solicitors, about whether their view of the client's guilt would influence their advice, was dropped as it appeared to cause offence and usually led only to a stern homily on the solicitor's role as adviser. The detailed analysis of the interviews was left until all of the interviews had been completed. The themes for coding were chosen separately for each group on the basis of the questions that had been asked and issues that emerged from reading through the transcripts. These were used as headings for charting the responses systematically. As the numbers involved were relatively low, findings are expressed as a percentage of that group or by the numbers involved.

A small number of interviewees, perhaps one or two from each group, were determinedly inscrutable. Despite prompting and supplementary questions, they would give only answers of the "can't remember," "don't know" or "every case turns on its facts" type. (A favoured, and frustrating, response to being asked how often they advised a no comment interview was "how long is a piece of string?"). This was difficult to circumvent. Suggestions such as "what if the suspect was unrepresented" sometimes elicited a clearer response. For those who had used or advised silence, practical examples could be explored. Using case studies or vignettes was a possibility but one of my pilot subjects, a stipendiary magistrate, thought that this would elicit as many caveats. He said that, in reality, any decision was so influenced by intangibles, such as the demeanour of the defendant, that it was impossible to make hard and fast rules.

Some solicitors appeared defensive about whether or not their actions were right. I sought to minimise this by responding that there were no right or wrong answers; that what was being researched was what was 'really' happening. Two solicitors who remembered *Standing Accused*[6] (McConville *et al.,* 1994) were wary of how the finished research might reflect on them. Otherwise I was surprised at how frank most interviewees were, for example a magistrate said that he drew inferences from silence even before the legislation allowed him to do so (JP/E); a detective claimed that his team make decisions about charging suspects rather than the custody officer (DC/A5); and legal representatives who said that they very rarely intervene in police interviews (Sol/D9/iii; LE(P)/F/i). These were all areas that they must have known that I was interested in and would write about, yet they were not obviously constrained by this.

It was emphasised in every request for interviews that confidentiality would be strictly observed and that nothing would be attributed in any publications. I did not always reiterate this at the beginning of the interviews, other than for the police, as I thought that over-stressing confidentiality risked making those who would otherwise have talked freely think that there was a need to be guarded. Confidentiality did not seem to be a consideration for

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[6] A critical examination of the organisation and practices of defence solicitors.

most respondents; only one solicitor asked about it and only the Crown Prosecutors who were critical of the legislation or its implementation sought reassurance. Respondents were always asked for their permission before the tape recorder was switched on. They all agreed but once or twice I was asked to turn it off and was told things 'off the record'. The first police officer interviewed in Station B was very reluctant to be interviewed on tape. I had just persuaded him when my, almost brand new, tape recorder stopped working. As all the interviews at this station were conducted on one day and as every dictaphone in the station had mysteriously disappeared, I had to make handwritten notes for these interviews.

2.4. Police Questionnaires

The questionnaire that was issued to police officers drew from a pilot interview with a police officer and another officer read it and made suggestions for improvement. It was not possible to pilot it fully due to time constraints and difficulties with organising this. In order to counter this, the questionnaires were issued in two stages to see whether any changes needed to be made (one hundred and then the remaining two hundred). Only three minor changes were made between the two versions, all in the right of silence section. The questionnaires were accompanied by a signed letter on university headed notepaper, explaining that what was being researched was whether the legislation had made any difference to the way in which officers do their jobs and to their workload. Officers were told that their answers would be used to find out what police in the area thought and that their answers would influence the interview questions for officers in the next stage of the research. The university logo was on each page of the questionnaire and a reminder was inserted on the top of each page that anything written would not be seen by anybody from Region X Police. The questionnaires had to be accompanied by a letter from the police Research Section. In order to reinforce the independence of the research, I declined their offer to collect the responses. Instead, each questionnaire was accompanied by a Freepost envelope addressed to the university.

Some studies have found a very low response rate from police officers to mailed questionnaires (Policy Studies Institute, 1983). A Metropolitan police officer, interviewed as part of the piloting had used this method as part of his BSc research and had a 57% response, which he attributed to the administrative efficiency of police officers.[7] The Research Section kept details of which stations the questionnaires had been sent to so that they could issue reminders. In order to maximise the response rate, the questionnaires needed to be attractive looking and easy to complete. As many questions as possible were made categorical. The structure was similar to the interviews, starting with a broad question as to whether officers thought the changes made to the right of silence were necessary, then guiding them through the interview situation, followed by a section on disclosure. It was not possible to make all questions categorical without limiting the data unduly, so a few questions gave space for respondents to elaborate on their answers and some were open-ended. Officers were invited to make further comments on the back of the forms. They were asked to provide some biographical data at the end so that the distribution of answers across OCUs, length of service and rank could be recorded. The response rate was 33%.

2.5. The Effects of the Interviewer

Interviews are an interactive process in which the demeanour of the interviewer can have a significant effect on the nature, quality and validity of data generated. Whilst there are limits as to how one can portray oneself in terms of appearance and attitudes, the opinions that

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[7] S. Gaskin (1995) 'Criminal Justice and Public Order Act 1994. The New Caution – Do Police Officers Understand it?' Unpublished BSc dissertation, University of Portsmouth.

subjects form of the researcher are crucial to the quality of the data (Van Maanen, 1991:31). I was conscious that I could be seen as a young, inexperienced, non-legally qualified, female researcher.

In some ways, being young may have been an advantage as I could ask questions about 'obvious' topics more easily. The "learner" role (Lofland and Lofland, 1984:26) is familiar to me and may have been useful for gaining more information. At first, I would tell solicitors that I did not have a legal background but stopped doing this as I became more familiar with the subject matter. Asking for clarification in interviews if I did not understand something never seemed to cause a problem. There are also benefits in "stranger value" to the researcher coming from outside the criminal justice system (Rhodes, 1994:549). Respondents know that they are not being judged by their peers and may welcome the chance to talk to an outsider about their work. I became more comfortable with the interviewing process as I grew more knowledgeable about the subject and the kind of answers to expect.

Criminal law is a male dominated field. I did not interview any female defence solicitors or judges and only one barrister, one magistrate, one magistrates' clerk and one police officer. Much has been written about the effects of gender on researching male dominated professions (Kanter, 1975; Easterday *et al.*, 1977; Warren and Rasmussen, 1977). Much of this literature relates to ethnographic work or research into topics that one would expect intuitively to be influenced by gender. It is not clear that the effects are the same in a short-term interview situation where the discussion is focused and guided by the interviewer. I do not feel that I suffered from "status liability" (Easterday *et al.*, 1977:336), or that my research was disadvantaged by my gender. Male respondents may make more effort when being interviewed by a woman (Easterday *et al.*, 1977), behave more chivalrously (Warren and Rasmussen, 1977:361) or perceive the researcher as less of a threat (Hunt, 1984; Warren, 1988). A corollary of not being seen as a threat may be that one is not taken seriously (Gurney, 1991:56) and is 'protected' from the truth by respondents (Warren and Rasmussen, 1977). I never felt that this was the case. Many respondents were surprisingly frank; swearing and relating unpleasant stories. An observation that applies to all the groups I worked with, is that:

> "What is more important than gender is the personality and skill of the field-worker in overcoming the feelings of suspicion the police have of all outsiders." (Brewer, 1993:134)

2.6. Conclusion

When looking at how and why any legislation works as it does, or when attempting to assess the balance between the rights of suspects and the powers of the police, the 'law in books' provides only a superficial understanding. A thorough understanding requires consideration of the 'law in action' through the organisational and individual practices of those involved in its execution. The research I conducted with criminal justice practitioners explores the occupational culture and practices of the police; the abilities and attitudes of legal advisers; the working practices of Crown Prosecutors; the role of the independent Bar; and the views of judges, magistrates and clerks. It considers the relationships between the groups, such as the police and the CPS. The programme of semi-structured interviews and questionnaires I conducted across Region X offers insights into these "emic" (insider) perspectives (Hendland, 1990). The results are interwoven throughout this analysis of the operation of these two controversial Acts.

Chapter 3: The Balance of Power in Police Custody - Cop Culture and the No Comment Interview

This chapter examines the police interview, the initial context in which suspects decide whether or not to exercise their right of silence. The custodial encounter takes place on police territory and on police terms (McConville and Hodgson, 1993:131). As one of the few strategies which has, historically, enabled the suspect to challenge this authority, the right of silence was opposed vehemently by the police. The curtailment of the right of silence, and subsequent proposals to restrict suspects' rights, were posited in terms of 're-balancing' a system in which the protections bestowed by the Police and Criminal Evidence Act 1984 (PACE),[1] in particular the right to legal advice, had made it too difficult to prosecute 'criminals' successfully.[2] Whilst the PACE provisions have almost certainly improved the treatment of the 'average suspect', these gains were part of a package of measures that were intended to counterbalance a substantial increase in police powers. This Exchange Abolitionist / 'rights balancing' view is overly simplistic in failing to consider how statutory provisions are mediated both through the occupational cultures of the police and legal representatives, and by the abilities of suspects to avail themselves of their rights. When the police, and to a lesser extent the prosecution, receive increased powers, they tend to exploit them to the full. Suspects' rights, in contrast, are often under-utilised due to inadequate provision, insufficient awareness, or through other pressures. The value of these gains has also been contested: research published prior to the CJPOA demonstrated that the protections received by many suspects were either inadequate or easily circumvented. It is argued that the flawed assumptions underlying the Act as to the ability of suspects to understand the caution and to make informed decisions as to whether or not to remain silent, together with the persisting deficiencies in delivering the safeguards provided by PACE, have left those detained in police custody doubly disadvantaged by the curtailment of the right of silence.

The exaggerated basis upon which the legislation was justified, meant that the direct effects of the changes, in terms of the incidence of no comment interviews, whilst significant, were limited. These quantifiable changes are considered at the end of this chapter. Of greater concern are the wider ramifications of the curtailment of the right of silence. My research provides empirical support for the argument of commentators such as Cape (1997) and Leng (2001) who contend that the most profound effects of the CJPOA have been upon custodial legal advice and the changing nature of the lawyer/client relationship. The right to legal advice was the fulcrum of the Exchange Abolitionist argument, yet the service provided was both practically and structurally flawed. Most suspects were not legally represented, although advice rates were increasing, and the quality of legal representation before (and since) the CJPOA had been criticised. Legal representatives have never had any formal authority at the police station to enforce their clients' rights. They have no power to require information from the police to enable an assessment of the legality of the arrest, detention and questioning: a no

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[1] No statutory regulation was made of police detention and questioning of suspects before PACE. The safeguards it introduced for suspects included: custody officers (ss36-9); detention time-limits (ss40-6); the right to inform somebody of their detention (s56); free legal advice (ss58-9); tape recording of interviews (s60); and judicial discretion to exclude improperly obtained or excessively prejudicial evidence (ss76-78 and s82(3)). Suspects may consult the Codes of Practice, Code C of which governs the "detention, treatment and questioning of persons by police officers." It provides miscellaneous requirements to ensure that the conditions in which suspects are held do not become oppressive.

[2] It was argued in Chapter 1 that there was little supporting evidence for such a case. Relatively few suspects gave no comment interviews; of those who did, most were convicted (Leng, 1993; Table 1). This Exchange Abolitionist (Greer, 1994) argument ignores the need for compensatory measures in an adversarial system, disregards the presumption of innocence and diminishes the burden of proof.

comment interview was one of the few sanctions or negotiating ploys available to them. By making custodial legal advice of potential evidential significance, perhaps requiring representatives to testify at the trial of their clients,[3] the Act has compromised the lawyer/client relationship, thus eroding the protective benefits of legal advice and tipping the balance even further against suspects.

This chapter begins with an examination of the occupational culture of the police as they have almost total control over the custodial environment. It considers how this affects the approach of the police to interviewing suspects and why the issue of suspects making no comment assumed such importance to them. Rising rates of legal advice was a motivation behind the CJPOA changes. The variable extent and, more significantly, nature, of the representation suspects receive are considered. It was known before the changes that many legal representatives were insufficiently adversarial. Whilst the accreditation requirements appear to have had an influence on the performance of para-legal staff, the CJPOA provisions have made it much more difficult for the representative to act in an adversarial manner. The courts have expressed their expectation that suspects will cooperate with the police when at the police station (*Howell*, 2002). There is, however, no reciprocal obligation on the police to disclose their case to suspects or their advisers. Section 34 has undermined one of the means by which advisers could elicit such disclosure. The final part of this chapter considers the impact of the CJPOA on no comment interviews.

3.1. 'Cop Culture'[4] and Control of the Custodial Encounter

The 'balance' between police and suspects, already skewed by the requirements of due process (see Chapter 1), is complicated further by the anomalous position that the police occupy in the criminal justice process. In an adversarial system, they are supposed to play an inquisitorial, fact-finding role, yet, until the Crown Prosecution Service was created in 1986, it was the police who collected evidence, charged and prosecuted offences in what were known colloquially as 'police courts.' The police continue to be perceived, by both themselves and the public, as agents of the prosecution:

> "We're salesmen for jail… it's us against them." (PS/A4)

The police were vociferous opponents of the right of silence. Despite research that showed that in practical terms it did not make a great deal of difference to their work, it assumed great symbolic importance to them. Over three-quarters of the police officers who responded to my questionnaire thought that the changes to the right of silence were necessary.[5] Of those who elaborated, 60% believed that this was because the guilty had exploited the provisions to escape justice:

> "Criminals were given a right to hide from accounting for their actions with no adverse effect." (Q/15)

> "Too many guilty people were using right to silence to escape justice. Something had to be done to redress the balance." (DS/45)

The police officers I interviewed were overwhelmingly (85%) in favour of the changes:

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[3] It is argued in Chapter 5 that the CJPOA has effectively made the police interview a part of the trial without the attendant safeguards (Jackson, 2001).

[4] Much of this section demonstrates also why the police were unsuited to the requirements of the CPIA, discussed in Chapter 4.

[5] Just 3% thought they were unnecessary. The remaining twenty per cent either did not know or were not serving when the changes were introduced.

> "I thought they were great... this was going to be a major breakthrough." (PS/A3)

> "It was a push in the back for police and they put pressure on the prisoner, defendant, suspect, suspect is probably a better word, to volunteer any information." (PC/A8)

Such beliefs may be explained in terms of police occupational culture ("the values, norms, perspectives and craft rules that inform their conduct" (Reiner, 2000:87)). Such attitudes are shaped by the challenges of their role, in particular "the two principle variables, [of] danger and authority, which should be interpreted in the light of a 'constant' pressure to appear efficient" (Skolnick, 1966:44). Police culture is neither a monolithic nor a static entity (Waddington, 1999).[6] Notwithstanding this, certain broad themes have been characterised as typifying a 'police' outlook, including suspiciousness, solidarity, social isolation, conservatism and a sense of mission (Banton, 1964; Skolnick, 1966; Reiner, 2000).

This sense of mission about preserving a way of life and protecting the weak is a central feature of cop culture (Reiner 2000:89). Police officers are in the vanguard of the criminal justice system. A sense of responsibility to complainants may increase officers' desires to achieve convictions, sometimes by dubious means; the "Dirty Harry" dilemma (Klockars, 1980; RCCJ, 1993:7; Waddington, 1999a:112-4):

> "I still feel disappointed with my length of service that you can't necessarily produce the results that you want to and go back and advise the injured party." (PS/A2)

> "They want to get a conviction... Nobody sees anything really wrong with that because they always think of that person as guilty and therefore they're doing society a service. They never consider that the person might be innocent and the prospect that they're doing an injustice." (Bar/B10)

Many police officers described their role in combative terms, often using sporting or martial analogies:

> "It's almost like a war, if you like. You know, 'I'm not telling you, this is my hand, I'm not going to show you everything' {laughs}." (DC/A5)

> "Don't give him any of your ammunition until you've got all his bullets." (PS/A4)

Such officers appeared to regard any measures to protect suspects, or tactics used by the defence, a no comment interview being the most provocative example, as unfair or cheating. Conversely, their own "tactics, or ploys," (Sanders *et al.*, 1989:56) were justifiable in terms of achieving the 'right result'. Such a purposive approach allows little sympathy for arguments about due process or the niceties of the burden of proof.[7] When asked to define 'obstructive' behaviour by legal representatives, one detective cited those who threaten a 'no comment' interview if he refuses to make full disclosure to them (DS/A6):

> "Suspect simply would not co-operate and was of the opinion that [the] police

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6 My research revealed some diversity of attitudes and opinions, ranging from the reflective and insightful to the combative and suspicious.

7 This bending of the rules to achieve the 'right result' has been described as "noble cause corruption" (see Kleining, 1996).

had to prove him guilty." (Q95/PS)

"The legal reps 'play the system' of 'if you can't prove it fully then we won't answer questions'." (Q19/CID)

The police may use the law to enforce their own objectives in addition to the criminal law, such as asserting their authority over certain groups or individuals (Singh, 1994:169). Suspects who exercise their right of silence present a challenge to the police both in terms of the aims of their investigation and to their authority:

"Suspects were laughing at us – stating no comment just to annoy officers." (Q41/PC)

The Exchange Abolitionist stance failed to consider the impact of police culture on the delivery of the protections offered by PACE. Some commentators have argued that the reforms introduced by PACE did not fundamentally change the ethos and practice of policing; the police merely adapted the provisions to minimise their impact on their established *modus operandi* (McConville *et al.,* 1991).[8] This ignores the significant improvements that have been made to the treatment of suspects in custody and the more professional conduct of the police (Maguire and Norris, 1992; Dixon 1999):

"It totally changed the outlook of the police on people in custody so compared to Judges' Rules, the situation is far supreme." (LE(P)/C/iv/1)

A search of the case reports revealed no judgments relating to oppression in recent police interviews[9] and only one solicitor in my own study reported having encountered physical abuse of suspects (Sol/A13/iii).[10] Some prosecutors complained that the balance had swung too far the other way:

"If anything, they are probably too fair... err on the side of caution... rather than go for the jugular." (EO/A4)

"They're too soft." (SCP/C5)

Most police powers are vested in the individual constable[11] and much of their work takes place without scrutiny ("low visibility discretion" (McConville *et al.,* 1991:16; Baldwin and Maloney, 1993). Officers can define their actions retrospectively in accordance with their powers (Holdaway, 1983). They can also fulfil the criteria of the statute in such a way that they still achieve their own ends, for example by re-interviewing suspects once the solicitor has left (Sol/E3/ii), or by rushing through the formalities to induce suspects to waive their right to legal advice (McConville *et al.*, 1991:48):

"Reform requires more than the promulgation of new rules. Reform requires a consideration not merely of a specific legal power, but rather of the context of

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[8] The PSI study (1983) distinguished three types of rules governing police behaviour: inhibitory, (such as custody time limits); working (customs and practices) and presentational (for example, custody records). The three are interlinked as the success of inhibitory rules is dependent upon the level of enforcement and their interaction with the working rules that in turn influence how officers present their actions.

[9] Casetrack search, July 2003. The only such cases relate to convictions that are many years old.

[10] Although Bridges and Choongh (1998) found that 69% of clients were not asked by their legal advisers how the police had treated them.

[11] The doctrine of 'constabulary independence', per Denning LJ in *R v Metropolitan Police Commissioner, ex p. Blackburn* [1968] 2 QB 136.

> that power in the fundamentals of the mandate, culture and practice of policing." (Dixon *et al.*, 1989:195)

Whilst some commentators have suggested that police interviewing is in decline as an investigative technique[12] (Williamson, 1992; Stockdale, 1993; Baldwin, 1993), it remains their principal strategy (Pearse and Gudjonsson, 1996; Reiner, 2000; Ainsworth, 2002). A confession offers the quickest, cheapest and surest way to secure a conviction.[13] The CJPOA means that what is not said by suspects may now be evidentially significant also. Suspects did not, (*Rice* v *Conolley*, 1966) and indeed do not, have to answer police questions but they are obliged to submit to legitimate questioning. It is insufficient to consider only the formal interview when examining the dynamics of police questioning of suspects; ("Interviews do not occur in a vacuum," (Maguire and Norris, 1992:1)). The interview can be influenced by variables such as: the individual and shared experiences of the officers and suspects (Singh, 1994), including the exercise of police powers of stop and search and arrest; the offence under investigation; the presence or absence of a legal adviser; and the objectives of the police.[14] The professional skill of the police and legal representatives is crucial, as is the 'performance' of the suspect.

The police may take arrested suspects into custody in order to increase the likelihood of their answering questions (*Holgate-Mohammed v Duke*, 1984; PACE Code C, Notes for Guidance 1B). According to a recent study of Crown Court cases (Pleasence and Quirk, 2002), the median detention time for suspects is sixteen hours, of which just thirty-eight minutes is spent in interview. Previous research has suggested that the average time spent in detention by all suspects is six hours and forty minutes.[15] Whilst this may be considered reasonably expeditious, and a fixed limit on detention[16] is preferable to none, or one as nebulous as existed before PACE, such a wait can be a great psychological strain on suspects. The police may exploit this discretion as part of the "softening up process, leaving someone to sit in a cell wondering what on earth's going to happen to them" (Sol/J14/i). Regardless of how ruthless or experienced a suspect is, the police have total control over the custody environment. Suspects may not know the strength of the evidence against them or the extent of police powers and may be fearful of what might happen to them, legitimately or otherwise. Bottomley *et al.*, (1990) found that access to friends and family is denied routinely, even in relatively minor cases. The power to grant or withhold bail is a powerful negotiating tool, particularly with those who are especially anxious to be released, for example, in order to satisfy an addiction or to make childcare arrangements.[17] Many suspects are unable to

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[12] Only six out of ten suspects are now interviewed and only 10% of these are interviewed more than once (Bucke and Brown, 1997).

[13] The RCCJ rejected a proposal that only corroborated confessions should be admissible as this risked excluding valuable admissions (1993:68). Some evidence emerged from my research that police and CPS practice is moving in this direction anyway. As one officer felicitously expressed it, "a cough [confession] is always nice but you need to nail the coffin shut" (Q7/PC). Others recognised that without corroborative evidence "Confessions are a dangerous method of deciding guilt" (Q77/DC).

[14] Much of the literature about interviewing, and the focus of this chapter, considers situations in which the accounts of the police and suspects conflict, or where the suspect refuses to comment. The majority of interviews are less antagonistic; all studies since 1992 have shown between 55% and 62% of suspects confessing (Pearse *et al.*, 1998). This means "it psychologically becomes less confrontational" (LE/B1/ii). Similarly, if officers have other sources of evidence, they may feel less pressure to obtain a confession.

[15] This ranges from just under four hours for less serious offences, to just over seven hours for moderately serious offences and to just under twenty-two hours for the most serious offences (Phillips and Brown, 1998:109).

[16] Reviews of the continued legality of the suspect's detention take place after six hours and every nine hours thereafter. A senior officer may authorise detention up to 36 hours; a magistrate up to 96 hours. The time limits are longer for those held under counter-terrorism legislation.

[17] "We've got an appointment for a woman... there's a bastard of a police officer dealing with it. He

conceptualise the long-term effects[18] of making admissions in interview and may co-operate with what the police want them to say in order to escape custody:

> "Many of our clients will say 'well I got bail, I was released that night' and that's all they think about, the immediate future." (Sol/A5/ii)

> "I think the police will take advantage. I do believe that a lot of bail bargaining goes on... I think the police quite often visit the suspect in the cells." (Sol/E3/i)

If the police have insufficient evidence to charge a suspect, then detention may be authorised only in order to "secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him" (s37(2) PACE). The custody sergeant,[19] a police officer, determines whether or not the statutory criteria regarding arrest, detention, charge and bail have been fulfilled. They are reliant, however, upon information from the investigating officers.[20] One detective was equivocal about how much needed to be explained about the grounds for arrest:

> "It's not always practical to explain every minute detail because that could cause an interview some damage if they [the suspect] are made aware at the early stages of what your emphasis is." (DS/A6)

It is rare for custody sergeants to question the judgments of fellow officers in front of suspects about whether or not there is sufficient evidence to merit detention (McConville *et al.*, 1991:44; Brown, 1997). To do so runs counter to the prevailing police culture of solidarity and the achievement of 'results' (McConville *et al.*, 1991:43):[21]

> "[Rarely] you can say 'you shouldn't have him here, you're on a fishing expedition'... the custody sergeant will invariably say 'Well we're holding him for interview anyway' because they've got to show the end product." (Sol/A13/iii)

Thus, the activities of custody officers can be little more than presentational, giving the impression of upholding suspects' rights but in reality merely hiding the status quo behind a veneer of propriety and paperwork. The custody record may be used to validate the actions of the police rather than acting as a constraint upon them (McConville *et al.*, 1991:49). As the official version of events, it is more difficult for suspects to refute, for example, if unauthorised cell visits are omitted (Sol/A12/ii) or are recorded as 'welfare visits' (Sanders and Bridges, 1990). Research available when the CJPOA began its passage through Parliament, indicated that custody officers were not just failing to ensure that suspects received their entitlements but, in many cases, were seeking actively to withhold them

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has told her basically, she has children to look after, if she wants to get in and out of the police station quickly then she shouldn't get a solicitor there, otherwise she'll be kept there all day." (Sol/E3/iii)

[18] See Lemert's classic account of the 'naïve' check forger, describing the inability of some offenders to consider the longer term consequences of their actions (E. Lemert (1958) 'The Behavior of the Systematic Check Forger', Social Problems 6: 141-49).

[19] Custody sergeants are responsible for the wellbeing of those in custody and maintaining a record on each detainee. They are both informant and gatekeeper of suspects' rights.

[20] A detective told me that, with CID cases, in practice it is the investigating officers, rather than the custody sergeant, who decide about charge (DC/A5).

[21] The exercise of the powers to impose conditional bail (s27 CJPOA) demonstrates how custody officers tend to act in accordance with police practice. Rather than using the powers to release those who otherwise would have been held in custody overnight, they have been used to impose restrictions on suspects who hitherto would have received unconditional bail (Raine and Willson, 1997).

(Sanders *et al.*, 1989; McConville *et al.*, 1991):

> "Custody sergeants just stick things on the sheets without giving it a lot of thought, in fact I've seen that happen. That bit where they're supposed to ask if they want legal advice, they're supposed to indicate why, they're very quickly over that, there's no discussion... People who've had visits by the officers that are not recorded on the custody sheets. I don't see why they would make this up, and after such visits and promises of bail, things are said... If it's not on the custody sheet, it didn't happen did it?" (Sol/D13/iv)

The police may structure the investigation and interview process in order to 'construct' a case against a suspect, rather than seeking to uncover objective, factual evidence (McConville *et al.*, 1991). As this process is heavily reliant upon the answers given, any suspect who remains silent is seen as obstructive and, by implication, as having something to hide. Suspicion is a deeply engrained, highly valued policing 'skill' (Dixon *et al.*, 1989). Being 'uncooperative' is an indicator of suspicious behaviour and refusing to answer police questions is the most provocative activity of all (McConville *et al.*, 1991:29). I was told repeatedly that "the innocent have nothing to hide":

> "I wouldn't want anybody who is innocent to be found guilty but, to me, the truth has got to be given and if they don't give it to me, or they go no comment, as far as I'm concerned, they are guilty." (PS/A4)

Police training in interview techniques has traditionally been poor. 'On the job' training provided by more experienced officers, a process described as more akin to an apprenticeship than training (Maguire and Norris, 1992:22) makes it more difficult to effect changes in behaviours, attitudes and practices. Formal training such as the PEACE[22] programme was intended to inculcate 'ethical', less aggressive and more 'information gathering' techniques. It was praised by some but it could not always be used as not all officers had been trained in it (PS/A3). Interviews are still rarely planned, even when the arrest has been (DS/A6). The police have developed a repertoire of tactics for interviewing suspects, especially the unresponsive, varying in ethics and efficacy and depending upon their individual abilities as questioners. Some improvements in interview techniques were noted (LE(P)/C4/i) and some interviewers, particularly the specialists, such as the child protection teams, were praised. The majority however, was criticised by legal advisers and Crown Prosecutors for lacking focus, for failing to ask key questions or to establish the necessary elements of offences:

> "I think interviews are conducted very badly in many cases." (Judge/B2)

> "There is a tremendous disparity of abilities." (SCP/A3)

The worst examples degenerated to pantomimic exchanges:

> "'You hissed through your teeth at me,' that was one of the best ones I've had. 'No I didn't.' 'Fucking did.' 'Fucking didn't.' I leave you to imagine how that conversation went!" (Sol/B10/i)

> "A lot of interviews are not interviews at all. They are just discursive ramblings from one side, followed by similar discursive ramblings from the other side... They confuse knowledge with evidence... They go for the cough [confession] because they are convinced in their own mind that somebody has done something, rather than doing as the Codes of Practice say which is conducting the interview for the purposes of obtaining evidence. They are

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[22] P- preparation, E - engage and explain, A - account, C - closure, E - evaluate (Shepherd, 1990).

simply looking for confirmation of a pre-conceived idea." (Sol/A5/i)

The police may question in a manner that "overtly manipulate[s] the suspect's decision making" (McConville *et al.*, 1991:69). Hypothetical questioning was criticised by a number of legal representatives.[23] Officers may use tactics to persuade suspects to confess, such as portraying this as the courageous option, or by implying that there is no other choice. Suggestions may be made about involving other people in the investigation if the suspect does not assist. Officers may allude to, or state expressly, the benefits of co-operation with regard to charge, cautioning, possible sentence or future investigations, even though this is forbidden, unless in response to a direct question from the suspect (Code C, para. 11.3):

> "I'm sure there are inducements when we're not there." (Sol/A5/ii)

> "'They told me they'd be' is the favourite one. You come out charged with some horrific series of dwelling house burglaries that'll net them four or five years, and when you say 'You're going down the steps for this one' 'They told me they'd be TICed.'[24] You can't *have* dwelling house burglaries TICed on a shoplift!" (Sol/A5/i)

"Verballing," or falsely claiming that a suspect had made incriminating remarks, was an easy means for the police to strengthen their case. It was suggested that 'non-verballing' or ignoring explanations given by suspects in an attempt to facilitate a s34 inference might be a new police tactic. This would accord with the notion of the police adapting legislation to suit their own ends, but none of those I interviewed had heard of this happening. One solicitor stated that in routine cases, the police rarely record anything that occurs before the taped interview (Sol/B11/i).

When asked about the protection of suspects, a quarter of legal advisers mentioned the improvements caused by the tape recording of interviews.[25] There is, however, a danger of conflating the "spurious credibility" (Fenwick, 1995:389) of the recording with the veracity of the confession. The protective benefits of tape-recording also cover only one part of the custodial encounter. Leng (1993:18) found that in half of the small number of cases in which silent suspects were re-interviewed, this followed an unrecorded discussion between the interviewer and suspect ("invariably when 'off record' the suspect will talk" Q40/DC). Whilst this does not necessarily indicate impropriety, as the suspect may have wanted to say something unofficially, it reveals a protective 'dead zone.'[26] Tape recording has also increased the pressure on suspects. By removing the need for contemporaneous note taking, it

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[23] Such questions are asked most commonly where suspects disagree with witnesses, ("Why would he say you did that") or to satisfy the criteria of a public order offence ("Do you think those around you felt frightened by your shouting").

[24] Where a suspect admits to having committed numerous similar offences, such as burglaries or deceptions, and is only charged with some of those offences, (the most serious), the remainder appears on a schedule of offences which the defendant asks the court to 'take into consideration' when sentence is passed.

[25] Section 60 PACE required the Home Secretary to issue a Code of Practice for the tape recording of interviews with suspects (Code E). Since January 1 1992, all interviews with suspects must be tape-recorded, except those that take place outside the police station, those relating to offences of terrorism or those conducted under s1 of the Official Secrets Act 1911.

[26] Tape recordings are listened to in only a minority of even the most serious trials (Zander and Henderson, 1993). Many files contain only a summary of the interview and transcripts are notoriously unreliable (Baldwin and Bedward, 1991). Several solicitors and Crown Prosecutors criticised the "wholly misleading" (LE/B1/i) summaries prepared by the police. Half of which, a proportion that increases with interview length, fail as an adequate record being either misleading or lacking in detail (Baldwin, 1993). The difficulties this can cause the prosecution if they are adducing evidence of a no comment interview are discussed in Chapter 5.

has reduced the time in which they have to consider their responses (Willis *et al.*, 1988; Baldwin, 1991) and freed the interviewing officer to scrutinise suspects.

3.2. Challenges to Cop Culture

Traditionally the police dislike "challengers"; those whose role is to scrutinise police culture (Holdaway, 1983:71-7), in particular legal representatives. There is evidence of these attitudes changing as rates of representation increase. This may be due to increased familiarity, a recognition that scrutiny poses no threat to a properly conducted investigation;[27] the lack of adversarialism of most legal representatives; and the restrictive effects of the CJPOA upon the impact of legal advice. Most legal representatives considered that, overall, they had reasonable relationships with at least some of the police:

> "A lot of arresting officers and interviewing officers don't necessarily want us there, because they see us as a hindrance. But the good officers, the ones who conduct interviews properly, are quite happy to have us there because they know there won't be any question of the interview being thrown out at a later stage because of the lack of legal representation." (Sol/A5/ii)

Almost two thirds of police officers described the role of solicitors in positive terms, such as ensuring fairness, advising their clients or helping. Some officers thought that legal representatives assisted by calming suspects or by clarifying questions for them (Q11). They can prevent the officer from becoming so embroiled in the interview that their questioning becomes repetitive and thus potentially oppressive (PS/A4). They may be a useful conduit for negotiations that cannot take place directly according to PACE, such as when the police are willing to issue a caution if the suspect confesses (PC/A8), or to suggest the sentence benefits of an early confession (LE/B1/ii).

A significant minority of police officers is still very hostile to legal advisers, whose perceived financial motive for 'getting criminals off' makes their actions even more contemptible. Although no question referred to legal aid, almost 10% of questionnaire respondents made some reference to solicitors advising their clients to make no comment in order to inflate their fees. Criticisms were made of the inducements, such as food, clothing or cigarettes, that solicitors offer their clients:

> 'I don't trust solicitors and legal reps because they are there to earn a lot of money... They think of it as business proposal. I see it as they are criminals. I get paid whether I prosecute or not.' (DC/B7)

Many serving police officers disapprove of their former colleagues acting as legal representatives (see below), partly on the basis that such 'insider knowledge' benefits suspects. They know to request items that would not have been disclosed previously, such as internal police documentation:

> "They can see where your questioning is going and cut you off before you get that far... They're sort of sitting there saying 'well if you say this, you'll get off with it'." (DC/A5)

One serving officer explained:

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[27] Some officers at Station A2 suggested that they were encouraged to advise suspects accused of serious crimes to seek representation as this avoids later allegations of impropriety.

> "I don't think I'd want to go and be supportive of somebody or a culture that I'm sort of trying to prevent their behaviour now." (PS/A3)

When asked to describe the role of legal advisers in interviews, 13% of police officers defined it as to 'hinder' the interview and several thought that legal representatives invented defences for their clients.[28] One officer claimed that some solicitors advise their clients to pretend to be mentally ill in order to receive lenient treatment (PS/B2). Some officers seemed to find the presence of a legal representative disproportionately threatening:

> "Certain legal advisers now appear to be more forthright in opposing what they <u>suggest</u> is oppression which in some cases may stretch to seeking to emasculate the interviewer." (Q25/DS, original emphasis)

> "Others are blatant conspirers to pervert the course of justice... There are those that obstruct interviews and bully junior, inexperienced police interviewers." (Q36/DS)

I was told of local rumours of cases in which the police had bugged the consultation; an allegation of which most lawyers are apparently aware (Wright, 1998). The police may check the status of representatives and try to 'take advantage' of young, female, black and / or inexperienced advisers (LE/B/i/2). One solicitor noted the improvement in the response he received once he qualified (Sol/B2/i). How well the police know the solicitor may be significant (Jackson *et al.,* 2000). There have been reports of police abuse of solicitors, ranging from insults and attacks on the solicitor / client relationship, to planting drugs and campaigns of harassment (Halliburton, 1999).[29] Only two solicitors in Baldwin's (1992a) survey had experienced resistance or hostility in interviews and none of the legal advisers I interviewed mentioned any such incidents, although some had experienced obduracy:

> "The police sometimes go out of their way to be rude. They will keep you standing there looking like a spare part just for sport. So, even though you're the lawyer, you know if you complain, they will do it all the more but find a good reason. If you do nothing, that will be deemed to be a sign of weakness so they'll leave you standing in the corner... As a lawyer, you're an irritation." (Sol/B11/i)

> "'I get on with [D1] CID but [D2] CID, wouldn't trust them an inch.' [Interviewer: 'Why?'] 'Just things they've done'." (Sol/D13/ii)

Complaints that the police were unduly hampered by PACE ignored the realities of the custodial experience over which the police have almost total control. The CJPOA accords with prevailing police attitudes about 'appropriate,' that is compliant and penitent, behaviour from suspects, a presumption that suspects are guilty and that the innocent having nothing to hide. The unsubstantiated rhetoric used by recent governments to curtail the rights of the accused provides legislative endorsement of the very police attitudes that PACE was intended to change.

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[28] There may be "bent solicitors who are protecting their clients in an unfair way" (Bar/B9). Bridges and Choong (1998) found legal representatives acting unethically or unprofessionally in 9% of cases, by offering suspects a fabricated defence or protecting them from criminal liability.

[29] In the most serious case of this nature, there now appears compelling evidence that the police in Northern Ireland colluded in the murder of one solicitor, Patrick Finucane, and the harassment of others (Cummaraswammy, 1998; Stephens, 2003).

3.3. The Complex and Coercive Caution

Only a late amendment to the Criminal Justice and Public Order Bill[30] ensured that suspects had to be under caution when questioned before inferences could be drawn from their silence. Much controversy attached to the complex re-phrasing[31] of the caution required by the changes to the right of silence.[32] Shepherd *et al.* (1995) found that 59% of suspects perceived the caution as "threatening" or "pressuring." The increased significance of the caution means that it is more important that suspects understand it fully; which gives greater power to those explaining it, particularly when suspects are unrepresented.

The new caution is "inappropriate as a concomitant of arrest" (Wolchover and Heaton-Armstrong, 1995:366) as, under s34, no inferences can be drawn from failure to mention something when arrested, only "when questioned or charged."[33] The wording 'it may harm your defence' is also inappropriate, as suspects do not need a defence before charges are brought, (SACHR, 1989). A sergeant I interviewed agreed that the new caution is too confusing on arrest and is also unnecessary, as most suspects are not questioned until they arrive at the police station:

> "Unless you're going to conduct some form of interview on the street, why have a caution on the street? You tell somebody they're under arrest, they know what it means – they're coming with you to the police station." (PS/A3)

The police are responsible for ensuring that suspects understand the caution, if necessary explaining it in their own words (PACE Notes for Guidance, 10.C). Some legal representatives tell the police that they do not need to explain the caution to their clients if they have already done so; most leave the decision to the police. The explanation given may be of significance if the prosecution seek inferences under s34 (see Chapter 5). This has led to some representatives adopting a defensive posture towards advising their clients, abdicating responsibility in order to avoid criticism of their conduct:

> "If I do give a no comment interview, I always make sure the police officers do explain it as well, because I don't want them [clients] turning round and saying 'well I wasn't told what it means'. It's on tape, they can't dispute that... At least then you can say... nothing to do with you." (Sol/D13/ii)

Most legal advisers and police officers follow the same formula for explaining the caution: dividing it into three parts and asking the suspect to explain it back to them. The "you do not have to say anything" and "anything you say may be given in evidence" clauses are relatively simple. The extra explanation dwells upon, thereby emphasising, the possibility of adverse inferences. The resonant words "opportunity" and "chance" recurred in the explanations

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[30] *Hansard*, Lords 7 July 1994 cols. 1386-1418. Also inserted into the Criminal Evidence (Northern Ireland) Order 1988 by sch. 10, para. 61(2).

[31] "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence" (PACE Code C, para. 10.4). One interviewee described it as "gobbledegook" (PS/B9/i).

[32] The initial proposal ("You do not have to say anything. But if you do not mention now something which you later use in your defence the court may decide that your failure to mention it now strengthens the case against you. A record will be made of anything you say and it may be given in evidence against you if you are brought to trial") was comprehensible to only 58% of A-level students, a level of academic competence few suspects reach (Gudjonsson and Clare, 1994). Of the general population surveyed, many claimed falsely to understand the caution (Shepherd *et al.*, 1995).

[33] Speculation that the new provisions might encourage the police to caution suspects earlier (Wasik and Taylor, 1995:56) has not been confirmed. A suggestion that the revised caution should include notification of the right to legal advice (Michael Mansfield, *Counsel* Jan/Feb 1995:30) was not pursued.

given by the police and even many legal advisers. The police had phrased the former caution in such a way as to lead suspects to feel they had no choice about exercising their right of silence (Baldwin and McConville, 1981:138). Making the new caution so complex that it needs explanation exacerbates this potential. Officers have been observed "translating" the caution for suspects with addenda such as "now is the time to speak" (JUSTICE, 1994:4):

> "They read the caution from a set card, set format and they go on to explain it and the explanations that are given are just outrageous. They bear no resemblance to what the law is or what the caution says." (Sol/A5/ii)

Several legal representatives thought that the police did not understand the caution and could not explain it, as demonstrated by the following example:[34]

> "PC: Do you understand the caution?
> Suspect: Yes.
> PC: Can you explain what you understand by that caution? Can you explain what you understand by what the caution's perception is or do you want me to break it down for you?
> Suspect: Break it down for me then please.
> PC: OK firstly you do not have to say anything at all. Do you understand that?
> Suspect: OK, yeah.
> PC: But basically what we're saying to you is if you have, answer questions tonight and tell us, er, speak to us basically, we're asking you to tell us the truth because if it goes to court then what you say today and what you say at court the judge may draw inference from that. Basically he may think you are lying at least once or possibly twice.
> Suspect: I understand that.
> PC: OK and anything you do say tonight may be used in evidence in a court if necessary. Do you understand that?
> Suspect: Yeah."[35]

A Northern Irish study found the "unanimous view" of solicitors was that most suspects do not understand the new caution (JUSTICE, 1994:14). The majority of police officers who completed my questionnaires thought that first time suspects (53%) and juveniles (56%) do not understand the caution:

> "I still think it's a very complicated language. It's all right for people that have got a modicum of education but a lot of people that we come into contact with will not understand the wording." (CJU/1)

Over 60% of legal advisers I interviewed considered that, even though they explain the caution to the suspects before the interview, most do not understand it:

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[34] I read this interview transcript at CPS Branch A. The interview took place in May 1998, in the presence of a solicitor who made no observation about the explanation.

[35] A solicitor gave me a similarly incomprehensible demonstration as to how he explains the caution:
> "If they were to be charged and the matter were to go to court, to trial, it could prove to their detriment if they did not put forward an explanation for their behaviour. Now, in as much as the judge could direct the jury that they had time to concoct a story between (I use that sort of language), between the time of their arrest and time at the police station and obviously the trial in court, and the jury could then come to the conclusion in fact he or she didn't have that explanation to give at the court (sic) but now they have it to give." (Sol/E3/iii)

"They say they do... I don't think they understand what an adverse inference is." (Sol/A7/ii)

"I can count on the fingers of one hand the number of clients who have been able to say back to the officer 'I don't have to answer your questions but if I don't etc.' in a nutshell. I think they think 'Well the onus is on me to give my version at the earliest opportunity or you're going to think I'm a liar.'" (LE/B8/i)

One solicitor had spent forty-five minutes trying to explain the caution to a thirteen year old with a mental age of seven (Sol/B2/i). This may be difficult and frustrating for the adviser; stressful and humiliating for the suspect. A quarter of legal representatives was equivocal about suspects' understanding of the caution. One did not always explain it if he was not advising a no comment interview:

> "It's not particularly relevant and to dwell on it, I know the theory that one should give the client all options available but sometimes it's just not practical to do that." (Sol/E3/iii)

Others thought that:

> "In general terms, most of them do [understand] but they couldn't explain it." (Sol/A13/ii)

Such low levels of understanding are of concern, particularly regarding the ability of unrepresented suspects to make an informed choice. This may be exacerbated by the developing perception amongst suspects that they have to answer questions:

> "More seasoned villains will understand that but youths now, their culture is that you have to speak to the police otherwise you are guilty and that's what they understand and it is very difficult to get them out of that." (Sol/B2/i)

> "The old lags, the clients who have been around the block, they know that the law has changed and they know that they've got to talk." (Sol/E3/i)

A minority of legal advisers (15%) thought that suspects do understand the caution. One took a particularly bombastic approach to ensuring their comprehension:

> "The ones that pretend they don't [understand] do and they've got something to hide, and they will object to it or pretend they don't understand and hope they can keep a door open to some half baked avenue of escape if things go pear-shaped later on. They do understand it – if only because I make them understand it... I also usually get the police not to delve into too much detail during the interview... because asking the average suspect to repeat back what he understands by the caution is meaningless." (Sol/B11/i)

Such views seem unlikely to hold true for all suspects ("you get quite a lot of thickos as you can imagine in the cells" (Sol/J14/i)). A high proportion of suspects in police custody is vulnerable in some way. [36] One third of suspects is "mentally disadvantaged," with an IQ of

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[36] Whilst it may be argued that most suspects in police custody are vulnerable in some way, PACE defines certain groups as particularly so and specifies additional protections for them. These are of varying benefit and provision is patchy. Those acting as appropriate adult for juvenile or mentally vulnerable suspects are frequently unable or unwilling to fulfil their protective role (Evans, 1993; Hodgson, 1994).

below 75. The average IQ score for detainees is 82, compared with a population average of 100. Another one-third of suspects experience extreme distress or mental disorder at being detained. 15-20% were assessed by psychologists as being vulnerable enough to require an appropriate adult, compared to the 4% identified by the police (Gudjonsson *et al.*, 1993). 69% of suspects gave a positive result when tested for drug use and one-third admit to dependence upon at least one drug (Bennet, 2000).[37] It has been argued that already vulnerable suspects will be made more so by the changes to the right of silence as it increases the complexity of decision making required. They are also likely to perceive the revised caution as more coercive (Gudjonsson *et al.*, 1994:104).

> "The more you put the suspect under pressure to have to say something, the more you are going to be at risk of them saying things either that they don't actually mean, or that they don't realise the implications of. And I wouldn't be surprised if in ten or fifteen years time, we have a spate of people saying 'Well, yeah, I know I said that, but I didn't want to stay there, I wanted to go home.'" (LE/B1/i)

3.4. The Value of Custodial Legal Advice

The right to legal advice has been described as a "fundamental right of a citizen" (*Samuel*, 1988 at p144; see also Article 6(3)(c) ECHR[38]). PACE gives suspects at the police station the right to free and independent legal advice, in private, by telephone, in writing or in person. Consultation with a legal adviser may be delayed under certain, albeit increasingly rare, circumstances.[39] The function of the legal representative is solely "to protect and advance the legal rights of his client" (Code C, 6D, PACE). The courts consider that the presence of a legal representative puts suspects on 'equal terms' with the police (*Chandler*, 1976). The Exchange Abolitionists argued that it gave suspects an unfair advantage over the police, enabling experienced criminals to escape justice on the advice of their adversarial advisers to remain silent.[40] This led to the syllogistic reasoning that as legal advisers recommended no comment interviews, the right of silence should be curtailed.

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[37] Suspects may be examined by the forensic medical examiner but this is to determine whether or not they are fit to be interviewed rather than fit to present their best case, (see discussion of *Condron*, 1997 in Chapter 5).

[38] The ECtHR held that as evidential consequences attach to the behaviour of the suspect at the police station, the right to legal assistance should extend to pre-charge police detention (*Murray* v *UK*, 1996).

[39] Once a consultation has been allowed, the adviser must be allowed to be present at any interview (para. 6.8C) and may be excluded only by an officer of at least the rank of inspector, for interfering with the progress of the interview. The police may exclude solicitors' representatives who have been 'disruptive' on previous occasions, even where no complaint had been made to a senior officer at the time (*R v Chief Constable of Leicestershire, ex parte Henning* (unreported, see Thwaites, R. 'Interviews on Trial' *Solicitors' Journal*, 17 December 1993:1278) also *R* v *Chief Constable of the Avon and Somerset Constabulary, ex parte Robinson* [1989] 2 All ER 15). Following *Murray* v *UK* (1996), inferences cannot be drawn from a suspect's silence if access to legal advice has been denied in these circumstances (Home Office Circular 53/1998, s58 Youth Justice and Criminal Evidence Act 1999 and Art. 36 Criminal Evidence (Northern Ireland) Order 1999 (SI 1999 No. 2789). If legal advice is denied, suspects should be given the former caution (CoP C, Annex A). There are caveats for suspects held under anti-terrorism legislation (s58 (13-18) PACE; *R* v *Chief Constable of the RUC ex p Begley* [1997] 1 WLR 1475).

[40] As described in Chapter 1, the RCCP considered the statutory right to legal representation to be a counterweight to the proposed increase in police powers. Yet "the availability of legal advice continues to be weighed in the scales by the courts, police and policy-makers to justify further encroachment upon the suspect's position" (Belloni and Hodgson, 2000:43).

This section considers the extent and quality of the protection provided by legal advisers, in particular in obtaining disclosure of the police case before interview, a necessary pre-condition if an interview is to take place on anything approaching equal terms. Rates of legal advice had increased but were still low and varied greatly. Little was known about the work of police station legal advisers until the early 1990s but representation was assumed to be of benefit to suspects. The reality was that unqualified advisers and non-adversarial solicitors were failing to provide adequate advice to suspects or to enforce their clients' rights sufficiently (Baldwin, 1992a; McConville and Hodgson, 1993; McConville *et al.*, 1994). This undermines the premise for curtailing the right of silence and means that suspects were further disadvantaged by the changes. Police hostility to external scrutiny militates against an equal exchange. Legal advisers are reliant on the police for information, with no powers to monitor or enforce police compliance with the rules. They could previously advise their clients to make no comment if they thought that the police were on a "fishing expedition," had acted improperly or were refusing to disclose their case. The CJPOA restricted this means of negotiation, which has circumscribed further the benefits of legal advice (Leng, 2001).

3.4.1. Rates of Legal Advice

There is great variation in request rates for legal advice but, for a free service, it is taken up by surprisingly few suspects.[41] Whilst there are discrepancies in the methods of collating statistics, the overall trend is that the numbers seeking legal advice rose after the introduction of PACE and after each revision of the Codes of Practice.[42] Even after the 1995 revisions, however, following the CJPOA, rates had reached only 40% (Bucke and Brown, 1997).[43] Not all of those who request legal advice receive it; a solicitor is not contacted in between 2% and 21% of cases, an average of 11% (Bucke and Brown, 1997); a decline from around 25% (Sanders *et al.*, 1989). Only two solicitors I interviewed mentioned that their clients were sometimes told, falsely, that the solicitor would not come out.

There are significant variations in the take up of legal advice between and within regions. Phillips and Brown, (1998) found regional variations in request rates of between 22% and 51%. Rates in London have been consistently higher than elsewhere. The West Midlands police stations in Phillips and Brown's study had request rates of 22% and 44% respectively. My study of Region X shows an average rate of legal representation of 55.2% (see Table 2), and a median rate of 54.8%. This varied between 43.9% in A2 (where most of my interviews took place) to 82.4% in H1.[44] The highest rates of legal representation occurred in a band across the centre of the region, including B City Centre. The lowest levels of legal advice were, perhaps surprisingly, in Town A, two Operational Command Units (OCU) in City C and Town E, one of the biggest towns in the region.

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41 Under the 1995 revisions of the Codes of Practice, custody officers are required to ask suspects who decline legal advice their reasons for doing so (Code C, para. 6.5). Bucke and Brown (1997) observed that fewer than half of custody officers did so.

42 Under the Judges' Rules, few suspects requested a lawyer and most requests were denied (Baldwin and McConville, 1979; Softley, 1981). Estimates of pre-PACE rates of legal advice range from between 3% and 20% (Softley *et al.*, 1980; Bottomley *et al.*, 1989; Brown, 1991). This rose after PACE to about 25% (Brown, 1989; Sanders *et al.*, 1989; Morgan *et al.*, 1991) and to 32% after the 1991 revisions (Brown *et al.*, 1992).

43 The Legal Aid Board attributes a 6.6% increase in suspects being assisted directly to the changes to the right of silence (1995-1996), although no evidence is cited to support this assertion. Neither does it explain the subsequent annual increases of 1.9% (1996-1997) and 6.4% (1997-1998). Bucke *et al.* (2000) suggest that this rise preceded the changes.

44 This figure, although similar to the surrounding areas, should be regarded with caution as only 17 interviews from H1 were transcribed.

Phillips and Brown (1998) found that the police station in which a suspect is detained is the most significant factor in predicting demand for legal advice. This has been attributed to variations in: offence type and seriousness (Brown, 1989; Philips and Brown, 1998); 'type' of suspect, including age, ethnicity, employment, physical and mental state and previous contact with the police, (Philips and Brown, 1998); provision of legal advice (Brown, 1989) and attitudes towards the police and legal advice (Morgan *et al.*, 1991; Philips and Brown, 1998). Police attitudes to legal advisers (see above) would also seem likely to be significant.

Many suspects have little conception of the potential seriousness of their situation. The police can use such ignorance to their advantage. One solicitor thought that legal advice should be compulsory:

> "I'm not saying that to double the amount of work. A lot of people don't appreciate the trouble they are in until... they come to see you and they say 'Well I was told by the police it was only a bit of scrapping.' No, it's called violent disorder and they get three years in the Crown Court." (Sol/D9/iii)

> "Our clients have got no conception of a) what [their rights] are or b) how to go about enforcing them." (Sol/A5/i)

The most common reasons cited by the police in their questionnaire responses for suspects declining legal advice were: time considerations (48%); "know the system" (31%); or the strength of the case against them (22%). Fifteen per cent of respondents, and almost all of the police officers interviewed, disputed the question on the basis that the majority of the suspects they interviewed is legally represented. Such a contention is clearly not borne out by the figures for Station A but may indicate how threatening or inconvenient some officers find having a legal adviser present. Over a quarter of legal advisers thought that time was the main factor for suspects declining legal advice, either the clients realising this, or the police telling them that it would take longer if they wanted a solicitor. Three alleged that in certain areas, the police actively discourage suspects from requesting representation[45] and one, an 'old school' ex-police officer, speculated dryly:

> "Perhaps the police don't like the solicitors!" (LE(P)/F7/i)

Opinion was divided between legal representatives as to whether recidivists had sufficient knowledge of procedures to feel they did not need advice:

> "I knew the score so why bother?" (Sol/A13/iii)

Or whether they knew the value of legal representation, if not necessarily advice, so would always obtain it:

> "The usual criminal element, they will always ask for a solicitor." (LE(P)/A12/i)

Legal representatives varied also in their views as to whether suspects always required their attendance. Suspects who request legal advice do not necessarily receive it in person; some may be advised only by telephone. Almost all of my respondents claimed they would attend the police station if a suspect were going to be interviewed.[46] The individual involved may

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[45] One solicitor described, when working in London, being left in the custody area while the police dissuaded his client from pursuing a consultation (Sol/E3/iii).

[46] I had no means of checking this. Sanders *et al.* (1989) found that solicitors claimed to attend the police station more than they actually did. 18% of advised suspects only receive advice by telephone (Bucke and Brown, 1997). 23% of all legal aid claims are for telephone only advice (Bridges and

influence the representative's decision about attending. One solicitor had been telephoned shortly before I interviewed him by a regular client who had stolen a pizza. During the advice call, the client said that he was going to admit the offence and that there was no need for the solicitor to visit:

> "If he'd been a juvenile or totally new to the criminal justice system, I probably would have gone." (Sol/E3/i)

The offence under investigation was also significant to some representatives. Two solicitors suggested they would not always attend suspects accused of shoplifting:

> "I'll say, 'Look, you've been arrested for stealing from this shop, just say yes or no, did you do it?' and if they say 'Yes I did it', then I will say 'Look, I'm not sure there's going to be much point in me coming down'. Because if you admit it, and if they haven't been in trouble before, quite often they'll just be cautioned." (Sol/J14/i)

> "There's no point, quick interviews, there's not much you can say. I can give you advice over the 'phone: definitions of theft, have you got money on you, did you have enough to pay for the items? Nothing much you can really say." (Sol/D13/ii)

Such views demonstrates how some representatives give little thought to the needs of their individual clients, (such as the impact of receiving a caution on a person of previous good character) or consideration to the wider benefits and responsibilities of their role (McConville *et al.*, 1994, discussed further below). The role of the legal representative is to protect the client. This requires attending the police station to assess *inter alia*: the suspect's physical and mental state, the circumstances of the arrest, the strength of the evidence and whether the legal criteria of the offence are fulfilled. (To use the example given above, an admission of taking goods from a shop would not constitute theft if the suspect lacked the requisite intention). Suspects may not feel able to talk freely on the telephone, few custody suites in Region X have telephones where clients can talk privately. One solicitor told me that he does not speak to his clients on the telephone as he thinks it is intimidating for them to be brought into a custody area full of police officers (Sol/A13/iii). Following the CJPOA, the decision as to whether or not a suspect should answer questions is more complex. The advice the representative gives may need to alter if the police change their approach. As described below, the police may introduce new material or question suspects about other offences once an interview has begun. These requirements can only be fulfilled if the representative is present.

Legal representation is increasing but is still received by only a minority of suspects. The curtailment of the right of silence, supposedly a *quid pro quo* for legal advice, of course applies to all suspects.

3.4.2. The Role of the Legal Representative at the Police Station – Adversary or Babysitter?

Legal advisers at the police station have what is often a "disagreeable and solitary calling" (Baldwin, 1993:373). They are generally regarded as unwelcome by the police, the work is unpredictable and stressful, the environment and the hours uncongenial and their clients may be difficult or unpleasant to work with:

Choongh, 1998). This includes cases in which no interview takes place.

> "We deal with the lowest level of society at the point of conflict and confrontation with society, in both the police station and in the courtroom. We deal with them shortly after their arrest and usually at their very worst. They are violent, fighting mad, hopelessly intoxicated. At all times of the day or night, weekend or holiday we deal with the sad and the bad. Cells daubed with excrement, clients vomiting copiously, bleeding, head-banging - it is just the norm and comes with the job." (Boyle, 1993:1279)

Solicitors have a less cohesive sense of professional identity than, for example, the police or barristers (McConville *et al.,* 1994; see Chapter 4). In contrast to the combative approach of the police, most legal advisers regard themselves as neutral referees or "babysitters" (Sol/B2/i; Hodgson, 1994:94; Baldwin, 1992a:1764).

> "Really the only point of going is to make sure that the interview is conducted fairly." (Sol/J14/i)

> "To make sure the interview is a proper representation of the client's case at that time." (Sol/E3/i)

This may explain why half of the legal advisers I interviewed were ambivalent about the changes to the right of silence:

> "I don't think it's made a great deal of difference, certainly not to our advice. Most clients have got a story to tell, denying it, no matter how ridiculous and, if that is their story, why not tell the police about it?" (Sol/A5/ii)

Almost half had been seriously concerned and expressed such views with vehemence:

> "What that effectively did was to shift the burden away from the Crown proving the case, putting that onto the defence to say 'You disprove it'. That, to me, is entirely wrong." (LE/B1/i)

> "They were unpleasant, they were symptomatic of the change in the legal system we've enjoyed since the Conquest, made principally, I felt, to satisfy the rabble of the Conservative Party conference... a backdoor method of improving detection and conviction as the police are fairly incompetent of improving it any other way." (Sol/D9/i)

Some advisers espoused the rhetoric about the right of silence but qualified it with observations similar to those expressed by the police, such as:

> "If the man is an innocent man, he's got nothing to worry about." (Sol/J14/i)

> "How many clients are not guilty anyway? We're not talking about major crime in [Town A]; we're talking about wife beating, shoplifting, theft, burglary, whatever and it doesn't make a great deal of difference at the end of the day because most clients are guilty – unfortunately." (Sol/A15/i)

Only one legal representative, a retired police officer, had supported the changes. He endorsed them in terms that appeared more in accordance with those of his former colleagues than his current role:

> "I think it was a necessary change really... rights of the victim as well. Your more thinking criminals did it as a matter of course. Into the police station, say nothing... talk it over with your solicitor, go away, find those witnesses,

> wait until it comes to court then produce them. That was an absolute travesty of our legal system. A complete waste. Everybody has got to have rights, and everybody has got to be protected, I'd agree 100% because there have been a lot of injustices in the past. But because of injustice in the past, we shouldn't allow criminals to conspire to defeat the system. And that's what they were doing. I don't see any reason at all why, if someone has got proper legal advice at the police station, that he shouldn't have to answer the questions, relative to the evidence." (LE(P)/A12/i)

The right of silence reforms have made custodial legal advice more complex. It has been suggested that the CJPOA has effectively made the police interview part of the trial (Jackson, 2001). It appears that many solicitors do not accord the interview such importance. The lower remuneration for criminal work, compared to other types of legally aided work and privately funded work, gives it a lower status amongst solicitors (McConville *et al.,* 1994:24). In many firms, police station work is accorded the lowest status of all. Police station work has traditionally been delegated to the most junior, frequently unqualified,[47] staff, or to agencies, often staffed by retired police officers who are considered inured to the working environment whilst solicitors concentrate their activities on higher profile and higher paid court work (Dixon *et al.,* 1990; McConville *et al.,* 1994:41). In contrast to the attitudes of the police, what happens in interviews is not regarded by defence lawyers as significant. Only one of the fifteen firms that I visited (B1) had any system for grading cases or specialisation amongst its staff to determine who should attend the police station.[48] McConville and Hodgson (1993:20) found that police station work was allocated principally according to staff availability, the onus lying upon delegates to say if a case was beyond their capabilities. Neither the police nor the Legal Services Commission keeps statistics as to the status of legal representatives. Non-solicitor staff have been found advising in between 14-30% (Brown, 1997), one third,[49] (Sanders *et al.*, 1989) and three quarters of 'own solicitor' cases (McConville and Hodgson, 1993). Bucke and Browne (1997) found this had decreased to 10% of work being performed by accredited representatives and 6% by unaccredited representatives. I did not survey this empirically but formed the impression that in Region X, legal executives performed the majority of police station work:

> "The solicitors don't come out so much now, you get a lot of runners in which, I would say eight out of ten are ex-bobbies." (PS/A4)

An area of some concern that emerged from my interviews was that half of the firms studied either employed former police officers as representatives or used agencies staffed by them. Dixon *et al.* (1990) found that "most" firms with substantial criminal practices did the same.[50] A former police officer (LE(P)/A/12/i) took great exception to the suggestion that he was a "poacher turned gamekeeper," arguing that his position is no different to barristers who both prosecute and defend. There are conflicts with barristers performing both roles, (see Chapter 4) but this ignores the effects of the much stronger occupational culture of the police and the consecutive nature of the two roles, whereas barristers tend to have a mixed caseload of prosecution and defence work. Two former police officers still referred to their clients in the police vernacular as "prisoners." One represented clients in the same police station in which

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47 In Northern Ireland, legal representatives at the police station must be professionally qualified.

48 This firm also had "red star" clients; those accused of serious, complex or unusual crimes or who were otherwise considered important. For example, a famous footballer charged with a minor assault would be represented by someone more senior than such an offence otherwise merited (LE/B1/ii).

49 55% of 'own' solicitor and 13% of duty solicitor attendances.

50 Part V of the Legal Services Commission *Duty Solicitors' Arrangements* (2000), forbids special constables from acting as duty solicitors (s32(f)(i)). If an applicant has been employed as a full time prosecutor in the last eighteen months he or she "must have had comprehensive experience of criminal defence work throughout the six months prior to the application" (s32(f)(iii)).

he had previously arrested and questioned them. He saw no difficulties in having "gone to the other side" but warned his clients to expect "familiarity" between him and his former colleagues. Thus far, none of his clients had objected. He thought that this was because they knew a solicitor would represent them at court which they regarded as more important, a view he appeared to share. When asked about police attitudes to the presence of legal advisers, he answered from the viewpoint of the interviewing officer:

> "The only time you're going to have a problem with a solicitor present is if you're thinking of doing something you shouldn't." (LE(P)/F7/i)

Some serving police officers suggested, however, that their former colleagues were more adversarial than other legal representatives:

> "Only the ex-police officers intervene and hinder the interview!" (Q81/PC)

The Law Society has introduced an accreditation scheme for non-solicitors.[51] This appears to have led to improvements in most areas for which legal representatives had been criticised. These targets are not onerous so the, still relatively low, levels of compliance indicates that many suspects are still receiving poor or inadequate advice. The low rate (about 25%) of success in registered representatives receiving full accreditation suggests that inadequate advisers are working for twelve months undetected, or that firms have a policy of using untrained, lower paid staff (Bridges and Choongh, 1998).

Advisers have been criticised for spending insufficient time with their clients before interview. Longer is spent on consultations now.[52] It can be difficult to establish clients' versions of events, particularly if they are inarticulate, intoxicated and / or untruthful. Bridges and Choong (1998) found that fewer than 60% of legal representatives attempt to do this, or discuss strategies such as whether or not to answer questions. They did find, however, a "generally high rate of compliance" with checking clients' understanding of what they are admitting and whether the legal criteria are fulfilled. Most legal representatives assume their clients will answer questions and give either neutral advice or recommend co-operation with the police (McConville and Hodgson, 1993). Asking legal representatives how they would advise suspects with whom they disagreed about whether or not to answer questions, provoked numerous homilies such as:

> "I only advise, I don't direct" (Sol/E3/i).

> "It is their right to conduct the interview as they want. I'll advise them but that's all I'm there for, I'm not there to tell them what to do, because I could end up being criticised by them." (Sol/A12/ii)

As professionals, legal representatives should be prepared to give their clients directive advice. An experienced legal executive described representing a respected authority figure, against whom there was overwhelming evidence of low level sexual abuse of children.

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[51] These provisions came into force on 1 February 1995 for duty solicitor work. Only those registered will be remunerated under the Legal Aid provisions.

[52] 54% of police questionnaire responses; Legal Aid Board, 1995-1999. Over half now last for longer than fifteen minutes (Bucke *et al.*, 2000), up from one third (McConville and Hodgson, 1993). Just 6% take more than one hour (Bridges and Choongh, 1998). Several police were concerned by what they saw as the inordinate amount of time one firm spent in client consultations as this counted towards the overall detention time. I was told of a consultation that, including the client's sleep, approached twenty-four hours (PS/A3; Sol/A12/ii recounted a similar story). I did not interview anybody from this firm. The longest consultation that any legal representative described was four hours for a very complex case (Sol/A/xiii/1).

Having sought confirmation from the investigating officer as to the strength of the police case, he advised his client that this was sufficient for him to be charged, convicted and sentenced to three or four years imprisonment. After a lengthy consultation, the client made full admissions, pleaded guilty and was given a community based sentence:

> "I spent an hour in getting the guy to cross the threshold... He's got to have the benefit therefore of the experience that we can bring to bear... It's much easier just to let it carry on and I think that many, many lawyers don't intervene enough in situations like that. And it's something that I would criticise many, many of my professional colleagues for." (LE/B1/ii)

Legal representatives have no formal authority at the police station. They are reliant on the police for information and for their safety if they have to go into a cell with a potentially violent client. They are required to be courageous and tenacious if they are to assert their clients' rights. The police have a wide discretion in the exercise of their powers and their relationship with the adviser may influence their decisions. This absence of authority means that many legal advisers see it as being in the best interests of themselves and of their clients to rely instead on cultivating good relationships with the police. This may mean taking the Utilitarian decision that it is better to be non-adversarial for one client so as not to prejudice future cases:

> "You've got to be lenient with the police, if you start rocking the boat with the police, then when you want some co-operation, you might not get it and at the end of the day, we're all there for the same thing aren't we – one side or the other side?" (LE(P)/F7/i)

> "I like to think I'm moderately objective when I'm dealing with cases, there are solicitors who believe every word their client says and will do absolutely everything and anything to try and thwart the prosecution. Perhaps I'm shooting myself in the foot but more often than not, I will need the help of the police in [a] case, more than they will ever need my help so, it doesn't pay to be bloody minded, because you get a reputation for that." (Sol/A12/ii)

One solicitor thought that working in the same, more rural, police station gave him some bargaining power as:

> "If they're going to bugger me about on one day, they know sure as hell I can do far more damage to them when I come up against them at a later date. On the other hand, that can lead to an incestuous relationship where the solicitor can cleave to the police more than he should, so it's a balancing act." (Sol/B11/i)

Advising a no comment interview is seen as a provocative action; legal advisers commonly gave their working relationship with the police as a reason for not advising silence (McConville and Hodgson, 1993). Most legal representatives tend to work in the same police stations, with the same officers. The client is a transient figure who needs to be kept reasonably happy to ensure his or her repeat custom but this can be ensured by negotiations over bail, plea or sentence, without upsetting the police. Even interventionist legal advisers were aware of the importance of their reputation with the police:

> "[I am] Chummy, whenever the client's not there and then cold when the client is there and then in interview, put on the other hat and be nasty if they're nasty... If they expect you to be Mr Chummy, then they're not likely to hold stuff back from you because they think 'Oh this guy's not going to do

> anything' and when they do pull a few surprises out of the hat and you act like a wanker then they don't know what to do, they're a bit stumped, so it is always best. But it's not good to be bolshy from the word go because you achieve nothing." (Sol/A13/iii)

Legal representatives have been criticised for doing little in interviews other than making notes, (Q60/PS). 39% of police questionnaire respondents thought that advisers intervened only rarely:

> "I am constantly surprised how little they challenge my questions. It makes me wonder whether they know what they are doing." (Q77/DC)

> "A lot don't play a very active role, could do or say a lot more – I would if I was one." (DS/B5)

Whilst some legal representatives described the proactive role they play in interviews:

> "I'm quite prepared to interrupt tactically if my client is about to put his foot in it." (Sol/E3/ii)

Overbearing behaviour by the police is rarely, if ever, challenged:

> "Generally it's fairly abysmal to us, because most lawyers are not pro-active at the police station, they don't give advice to their clients in strong enough terms." (LE/B1/ii)

Earlier research (McConville and Hodgson, 1993; Baldwin, 1992a) found that few interventions were to control police behaviour. Some representatives helped the client to understand the questions or to explain their story, others played the role of a third interviewer. Advisers are still more likely to intervene in relation to their clients than to challenge police behaviour (Bridges and Choongh, 1998):

> "I've lost my rag far more than police officers do with my own clients." (Sol/B11/i)

> "[We intervene] Not to help the police because that's not our job, but not necessarily to hinder them, but to help the cause of justice really." (Sol/A5/ii)

Reasons for this "feeble (one might almost say supine) posture" (Baldwin, 1992a:1762)) include: a belief that no harm will come to the client, or that the suspect's account will sound more convincing if told unaided; the adviser shares the police view of the client's guilt; fear of damaging ongoing relations with the police; or ignorance of their powers of intervention (McConville and Hodgson, 1993).

Bridges and Choongh (1998) found that accredited representatives have become more interventionist. Interventions were made in 78% of cases in which it was deemed necessary (61% of all cases); an increase from estimates of less than 6% of cases (Greater Manchester Police, 1988) one quarter (McConville and Hodgson, 1993) and one third (Baldwin, 1992). Amongst my respondents, the more senior solicitors were less likely to advise no comment interviews than the more recently qualified representatives were. Several police officers noted a recent difference in adviser behaviour. One thought that legal executives try to assert themselves whereas solicitors "tend to let interviews roll." She complained about two legal executives who do not understand that "interviews aren't battlegrounds" (PC/B3).[53]

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[53] An interesting contrast with the combative language many of her colleagues used to describe their

> "You seem to get this, more of a confrontation with the younger or newer ones." (DC/A5)

> "I think they try to take control a lot more than what they used to." (DC/A9)

A poor or inept legal adviser may be more damaging to the suspect than having none. Their acquiescence may be interpreted as legitimizing inappropriate behaviour, making the exclusion of improperly obtained evidence less likely (*Dunn*, 1990). Poor legal advice to make no comment will not protect defendants from adverse inferences (*Condron*, 1997; *Roble,* 1997). The courts have not supported suspects' right to legal advice wholeheartedly, particularly for those who have been legally advised in custody previously (*Dunford,* 1990). Such reasoning assumes the suspect remembers the previous advice, equates an awareness of rights with an understanding of how they should be exercised and discounts the expertise of the lawyer in advising on the facts of each case (Hodgson, 1992). No matter how many times a suspect has been detained and questioned by the police, an adviser may recognise a need to remain silent where suspects cannot be expected to, either through a lack of legal knowledge or because of their physical or mental condition. The judgment fails also to consider the quality of the advice suspects may have received previously: the provision of an adviser does not guarantee the provision of advice, legal advice, or competent advice (McConville and Hodgson, 1993:193).

Most advisers do not stay for charge, even though inferences can be drawn from a suspect's silence at this stage. (One firm had a policy of staying for charge initially, but they stopped doing this once they realised that inferences from silence at this stage were never an issue at trial (LE/B1/ii)). Some claimed that this was due to the exigencies of work; others found waiting boring. One suggested that the police in Region X dislike legal advisers staying for charge, resenting being monitored at this stage (Sol/E3/iii). The decision to stay appeared motivated primarily by whether they thought the Legal Services Commission would pay them for this time (Sol/A13/iii). One solicitor stayed for charge "because I like to get them signed up for the legal aid and keep the charge sheet then they are less likely to wander off elsewhere" (Sol/A12/ii). His decision was governed by the time of the interview. If it were during the day he would stay; at 4am, he would go home.

The importance of custodial legal advice has been identified as a fundamental feature of a fair trial by both the domestic courts (*Samuel*, 1988) and the ECtHR (*Murray* v *UK,* 1996). The service offered by the police station legal adviser varies enormously between the individuals involved. The combative approach of legal representatives formed the basis of the Exchange Abolitionist argument. Research available before the CJPOA was enacted suggested that legal advisers were rarely as combative as they were claimed to be by the sponsors of the Act. In many cases, the services provided continues to fall short of the protective function it is supposed to offer, leaving suspects further disadvantaged by the CJPOA.

3.5. Strategies Relating to Pre-Interview Disclosure

One of the most significant benefits that legal representation offers suspects is in obtaining disclosure of the police case before the interview:

> "The usual criminal element, they will always ask for a solicitor. The main reason is they know they will get disclosure of the evidence." (LE(P)/A12/i)[54]

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own approach to interviews.

[54] 43% of officers replied in the questionnaires that they would not give unrepresented suspects an outline of the case against them, 56% would not read the main points from statements to suspects, and

Legal advisers have no entitlement to disclosure before interview. Without this, there can be no balance in the interview, as legal representatives have no means of checking the veracity of the police account, of determining the lawfulness of the arrest or the legitimacy of the interview.[55] Without knowing the strength of the evidence, legal representatives cannot assess whether to advise suspects to answer questions or not. The threat of a no comment interview had been a useful bargaining tool for legal representatives prior to the CJPOA, but this is now a risky strategy. The adviser has to judge whether the danger of adverse inferences from not answering questions outweighs the risk of the suspect providing the evidence as a result of which they are charged:

> "The difficulty with answering the questions is when half of the case is put together and you then give the opportunity for the police to go round and get the second half of the case together." (Sol/B10/i)

> "We are always, therefore, starting pretty much on the back foot. If we don't see the statements and we are only given a summary, we are working with what they tell us. Whether they are telling us a true and accurate reflection of what the statement says, or whether they are in fact just picking out what they think are the salient points in the statement relevant for the purpose of interview, we know not." (LE/B1/i)

Several officers suggested that pre-interview disclosure depends on what they are asked for by legal representatives; they will not volunteer anything. Almost 20% of officers replied that they do not give the advisers an outline of the case, only one-third read advisers the main points from witness statements and fewer than 20% provide copies of the evidence.[56]

Disclosure is at the discretion of the officers; it often relates to how well they know the adviser and their opinion of them:

> "It varies because of location and it varies because of who you are. Within [City B] almost no problem at all, it's only a question of degree and it... literally varies from police officer to police officer... [Town A is problematic] Now, whether that is because we are a [B] firm going into [A], or whether [A] CID are like this with all solicitors, I know not but I can tell you my own experience is that as an experienced [B] practitioner, if I go into [A], I don't expect to be told the full story... The impression I get from speaking to [City C] policemen is that they don't have a very good relationship with their solicitors over there. They don't trust the solicitors and vice versa." (LE/B1/ii)

> "Do we know the lawyer and prior dealings (i.e. trust, communication, helpful?) Will also have a bearing." (Q40/DC)

A sergeant saw disclosure as a privilege to which only amenable legal advisers were entitled:

> "If there's a solicitor I've had problems with in the past, I'd say no. If they've upset me in the past then, 'No, I'm not going to make your job easier mate,

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hardly any would let suspects see or have copies of the evidence.

55 One solicitor told me about a series of interviews in which the interviewing officer had lied to him about having statements and evidence (Sol/A13/iii). The courts have taken a more robust approach to excluding evidence where the police have lied to the solicitor rather than the suspect (*Mason*, 1987).

56 Although one solicitor contended that the risk of missing something significant when trying to decipher badly written and photocopied statements made verbal disclosure preferable (Sol/B10/i).

> you find out what I've got'... If the solicitor's there and he's been unhelpful to me in the past, then he's got to earn his corn and he can stop the interview." (PS/A4)

Such attitudes demonstrate how the contingent nature of disclosure and the importance to defence lawyers of maintaining reasonable relations with the police, may make it difficult for advisers to be adversarial. By acting appropriately in one case, they risk getting less disclosure in every other case they have with that officer. The combative approach of many police officers means that they see disclosure of information as weakening their position:

> "CID won't let you see any of their statements, they'll just tell you what's in them. Most plods will let you see it... It's a power game with them [CID]." (Sol/A13/iii)

> "I wouldn't go out my way to offer information they are not entitled to have. They are as biased as we are!" (Q74/PC)

and, most melodramatically:

> "Would you give a country your battle plans if you were about to go to war? No." (Q100/PS)

This secrecy may be related to the police culture of suspicion of others, described above. Several police officers expressed the view that, whilst not accusing legal advisers of any specific wrongdoing, they could not be trusted with full disclosure:

> "I'm not saying that solicitors would concoct a story with their clients but I don't know what goes on in their consultation and if I were to say that fingerprints were found on the back of the TV set then he might suddenly have become a TV repairman in a previous life, not, you know, you're just manufacturing a defence on their behalf." (DS/A6)

> "It's obvious that when information is disclosed prior to interview the suspect is given get out of jail information that has obviously not come from their own knowledge." (Q10/PC)

The reluctance of the police to make disclosure accords also with notions of "case construction" (McConville, *et al.,* 1991). As one solicitor explained:

> "They believe that it is a legitimate tactic because they will assume that the defendant will lie and therefore, if he tells the truth and it accords with what they've got, you've got a match and therefore he must be telling the truth, but if there's something different and they've held back, they can then introduce that to try to trip the person up or to accuse them of lying." (Sol/B2/i)

Some officers disclose information incrementally in operations in which a number of offences are being investigated, or if there will be several interviews relating to offences over a long period of time (DS/B6). PC/A8 described a robbery investigation in which relevant disclosure was made before the interview then, when that interview ended, further disclosure was made relating to offences of witness intimidation. He adopted this tactic because:

> "It helps us sometimes not to cram everything into one interview... If a suspect only believes they're going to be interviewed about that and you then end the interview and you then make further disclosures, you're then building up the pressure."

Since the CJPOA, the tactics used by the police and defence relating to disclosure have changed. Obtaining disclosure remains a problem for legal representatives, but the strategies available to them for eliciting such material are more limited. Because representatives are now wary of advising no comment, if the police refuse to disclose their case, they may advise the client to "say something and stop the interview if you are not too sure" (Sol/D13/ii) or say that they will intervene if the police introduce undisclosed material. There is a danger, of which are officers are aware, that the suspect may have answered before the adviser can respond (DC/A5):

> "We were having a lot of interviews stopped 'I need a consultation with my client' and to be honest, I'd rather do that, I'd rather go into an interview and say something and the solicitor knows nothing about it. I mean, it's a particularly selfish way of looking at it, I suppose the suspect, nine times out of ten has answered your question before the solicitor says 'Oh, hang on a minute.'" (DC/A3)

The police are now in a much stronger position. Previously, if they refused to make sufficient disclosure, the legal representative might advise a no comment interview. This could frustrate police enquiries if their case was weak. Following the CJPOA, representatives are less willing to advise no comment and the police are in the position of, either being able to surprise the suspect in interview, or knowing that inferences from a no comment interview may strengthen their case.

It was thought initially that the CJPOA had "transformed the culture of police-legal adviser relations" in terms of disclosure (Bridges and Choongh, 1998:xi). A solicitor told me that it had caused:

> "A complete re-training... most officers now understand the reasoning behind the real necessity for disclosure." (Sol/A5/i)

Fuller disclosure may indicate a change in police methods, rather than a change in culture. Hitherto, ambushing the suspect with evidence was an effective means for the police to achieve their desired 'result'. Now they wish to avoid suspects having any 'get out' from inferences being drawn at trial. One detective provides legal advisers with a copy of all disclosure made, including copies of statements ("it's handy for solicitors") but his motivation is to prevent any dispute at court (DS/A6). One legal representative believed that, having opposed the changes to the right of silence, he now felt they had been a reasonable trade off for the improvements in disclosure (LE/B1/ii). Another legal executive from the same firm, however, thought that police practice had gone "full circle back to where we started" (LE/B1/i). When the caution first changed, the police had disclosed everything for fear of losing prosecutions. Once they realised that they were not obliged to make full disclosure, they began withholding statements and giving only verbal summaries of the evidence again.[57] Sergeant A3 agreed:

> "[Disclose] as little as possible. There was a point three or four years ago... the emphasis on disclosure became stronger shall we say. That we were saying 'Oh, you've got to tell the solicitors everything, disclose, tell them everything, give them the statements. But I think, as a service, we've stopped

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[57] He thought that local police attitudes regarding disclosure may have hardened following an incident in which his colleague had had a statement upon which his advice was based taken forcibly from him after he refused to return it after the interview. Sol/E3/iii considered that disclosure had become 'patchy,' even from officers who had previously been open, suggesting that such policies are reviewed at a higher level.

that really now, and I don't see that there's any need for that."

"It's very cat and mouse." (DC/A5)

The courts have ruled that inadequate disclosure of the police case will not necessarily avoid inferences being left to the jury from a suspect's silence at the police station (discussed in Chapter 5). It cannot be fair that evidential significance attaches to the suspect's decision whether or not to reply in interview, when they and their legal representatives must make this decision in the absence of full knowledge of the nature or the strength of the police case.

> "If you're going to have a watering down of the right of silence, then a person who is being advised or interviewed at a police station has got to be properly advised and you can only properly advise a person when you know what you are advising about and therefore you have got to have disclosure of the Crown's case so that you know. And I'm afraid that I don't think that you always get disclosure or full disclosure, or honest disclosure and so that, if they're cheating, then that defeats the whole idea of it to be honest and it should revert back to the complete right of silence." (Sol/B1/iii)

3.6. "If in Doubt, Say Nowt": Deconstructing the No Comment Interview

The old legal aphorism of 'if in doubt, say nowt', whilst never satisfactory, or as widespread[58] as the police believed, has become positively negligent since April 1995. Legal representatives have to make a decision quickly and in difficult circumstances, often in ignorance of some or all of the facts, knowing that their decision could have negative repercussions for the client:

> "The imposition on the lawyer is really quite tough, because we are now in a very unenviable position of, if our advice is wrong and we don't give adequate legal protection to our client... it's an element that can be used to convict them... There is more thought process required." (LE/B1/ii)

> "Police station work has changed, in my view, out of all proportion." (Sol/B10/i)

> "At 3 o'clock in the morning you've been dragged out of bed, your pyjamas are sticking out from underneath your jeans and you're trying to write a cogent note about why you've given certain advice which somebody is going to sniff over nine months later." (Sol/D9/ii)

Table 2 shows the results of the data the police interview transcribers in Region X collected on my behalf. Of the interviews that they were asked to summarise, they recorded whether the suspect was legally represented and whether there had been a significant refusal to answer questions, as defined by the interviewing officer. The overall rate of suspects making no comment was 6.1%. This varied by OCU from 1.2% to 15.1%. The mean rate was 6.2% and the median 4.5%. 82% of suspects making no comment were legally advised. There were, however, areas with high rates of legal advice and a low incidence of no comment (G1) and vice versa (A1). There did not appear to be any geographical trends in the no comment figures; Areas A1 and F2 were amongst the highest, A2 and F1 the lowest.

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[58] See Table 1. McConville and Hodgson (1993) found no cases of legal advisers routinely advising no comment before the CJPOA.

The first study to compare the use of 'no comment' interviews before and after the CJPOA suggested a sharp decline in its use (Bucke *et al.*, (2000). I have summarised the main findings in Table 3).[59] The number of suspects who refused to answer all questions fell from 10% to 6% and those refusing to answer some questions fell from 13% to 10%. The reduction occurred across all police stations, by more than 25% in almost every category. The greatest fall occurred amongst those receiving legal advice, black suspects and those charged with serious offences, those groups previously most likely to make no comment. The pre-CJPOA incidence of no comment interviews is twice as high as Brown's (1994) "best estimate." The figures for after the changes are also higher than these 'baseline' figures (see Chapter 1). The data were collected by the interviewing officer very soon after the provisions came into effect. This was a time of great tension for legal advisers as there was no case law to guide their decision making and their concern for protecting themselves is likely to have led them to err on the side of caution. The police were disclosing more prior to interview during their initial enthusiasm which would have reduced the number of no comment interviews. My data suggest that as these effects appear to be wearing off, the impact may be diminishing.

Bridges and Choongh (1998) observed that advice to remain silent had remained the same despite almost three-quarters of non-solicitor legal representatives saying that they advised it less often. This advice was given in 19% of cases (varying between 25%, 11% and 24% in the three police stations studied). The most commonly cited reasons for advising silence were where the police had insufficient evidence (69%), or had made insufficient disclosure (50%).

Jackson *et al.* (2000) evaluated the effects of the Northern Ireland Order.[60] The police and solicitors they interviewed thought that it had made those charged with non-scheduled offences increasingly likely to answer police questions but that it had not affected a hardcore of terrorist suspects. Legally advised suspects were more likely to remain silent than those who were unrepresented. They concluded that the increased provision of legal advice may have had as great an impact on suspects' decision making as the Order.

Amongst my respondents, only 7.5% of legal advisers considered that the majority of their interviews had been no comment before the changes; 15% did not advise silence often before the changes. When asked how often they advised no comment interviews now, almost 20% said 'never' and almost a further one-third said between 4-10% of interviews. Just over 10% said that they had 'plenty' (1/4 or 1/5) of no comment interviews. The rest found it difficult to estimate or did not answer directly. 38% considered that they advised silence less than before the changes, none advised it more.[61]

Only half of the police officers I interviewed thought that there had been a decline in no comment interviews since the changes, almost a third thought that there had been no real change. When asked what percentage of interviews was 'no comment' now, more than 10% said none; 45% said less than 1 in 20; and over two thirds said less than 10%. When asked in what situations suspects tended to make 'no comment' since the CJPOA, 70% of police questionnaire respondents considered that it depended on the legal advisers; either that legally advised suspects were more likely to be silent or that certain firms advised silence more

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[59] Data were collected on 3,950 suspects from eight police stations across the country, a year before the provisions were introduced (Phillips and Brown, 1998) and five to ten months afterwards, (Bucke *et al.*, 2000) using the same methodology.

[60] A lack of data from before the Order and the introduction of PACE in 1990 meant that it could not be established empirically whether the number of suspects refusing to answer police questions had changed. This lack of data reinforces the insubstantial premise upon which the Order was introduced.

[61] The remainder was not in practice before the changes or did not express a view (both 23%).

frequently, or even routinely[62]; the individual concerned (39%); or the strength of the police case (37%).

The reasons that legal advisers gave me for advising[63] no comment now included: a weak police case or suspicion they were 'fishing' (62%); insufficient disclosure (31%); the complainant was likely to withdraw, especially in domestic violence or public order cases[64] (27%); the suspect was guilty (12%) or unfit to answer questions (12%). Other reasons for advising no comment included: the risk of the suspect incriminating themselves in this or other matters; the overwhelming nature of the evidence; the complexity of the allegations or age of the incident; the police cannot prove which individual was responsible for an offence[65] or the suspect is unable to provide coherent answers to questioning. Some representatives have clients who make no comment routinely, regardless of the advice they are given (Sol/D9/i), although another dismissed the professional no-commenter as "a complete myth" (Sol/B10/i).

The potential evidential importance of legal advice has affected the nature of the solicitor/client relationship (the case law is discussed in Chapter 5) as advisers now consider the ramifications for themselves as well as, or perhaps instead of, the client (Cape, 1997; Leng, 2001). The prospect of giving evidence caused consternation amongst many representatives ("It scared the living daylights out of me" (Sol/A12/ii)). Four insisted that clients signed their attendance notes or a specially produced document or to say that the decision to make no comment was entirely their own:

> "They're thinking I'm there to advise them. I say 'it's got to be your decision at the end of the day'. I don't want to get the blame... I'm fearful of that. That's why I try to put the guilt trip on the client as it were. I let him decide. More often than not, I get him to sign something." (Sol/D13/ii)

> "It's so rare that you advise them to remain silent, that you make sure you've got concrete reasons for doing it, because you always think 'I may have to take the stand about this one day'." (Sol/A13/iii)

Such attitudes are wholly contrary to the protective function of legal representation and distort the solicitor/client relationship. These solicitors are more concerned with protecting their own positions than acting solely in their clients' interests. One of the disclaimers I was shown was so all-encompassing as to be meaningless to suspects but covered the adviser against any eventuality:

> "I [name] have been advised by my Solicitors, [name and address of firm],

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[62] One Area B firm, that I did not visit, was described by a detective as "notorious for no comment interviews" (Q45/DS). Six of those interviewed mentioned this firm, "They're bandits!" (PS/B2).

[63] These were situations in which the legal advisers said that they might advise a suspect to make no comment. Some of them had never or rarely done so in practice. The reasons for advising silence in McConville and Hodgson's (1993) study were, in descending order: lack of knowledge of the police case; the interrogative suggestibility of the client; to protect the adviser if they did not know what to do; insufficient evidence or the complaint is likely to be dropped; the client always gives a no comment interview; or the police have sufficient evidence to charge anyway. All of which, apart from the third, are perfectly proper reasons.

[64] In such cases, if the injured party does attend court, the suspect will usually plead guilty which means the question of inferences does not arise.

[65] If two people are in a car in which drugs are found (LE/B8/i) or a child is killed when both parents are present (DO/B2), the prosecution must establish which of them committed the offence. A no comment interview can frustrate this, although no more so than both suspects denying involvement or blaming each other. The latter in particular has been used as another emotive argument for further restricting the right of silence (Law Commission, 2003) see Chapter 1, n18.

> that an adverse inference may be drawn if I make no comment in an interview. Nevertheless I wish to have a "no comment" interview and fully understand the consequences that may subsequently arise. Signed ___ Name (please print) ____ Date ___." (Firm J14)

Firm B8 had faced a negligence action from a client who had been advised to make no comment and against whom inferences had been drawn at trial. This was defended successfully by producing the note that the client had signed, stating that it was her decision to remain silent. A legal executive from this firm suggested that as other avenues of 'escape' are shut to defendants, they will increasingly seek to blame their legal advisers. Another representative believed that a signed note strengthened the client's case where no comment was advised for a reason such as inadequate disclosure (LE/B1/ii). In every such case his firm had defended, the CPS had decided against inviting adverse inferences once they had seen such evidence.

Few solicitors showed awareness of, or interest in, exploiting tactical gambits for avoiding inferences from a no comment interview. Practice varied as to whether advisers stated their reasons for advising no comment at the beginning of the interview, reflecting the confusion as to whether this would protect clients from inferences and whether it waived privilege.[66] A small number had advised suspects to remain silent then handed in a prepared statement at charge.[67] Some could see a hypothetical benefit in doing so, but several contended that they could not see the point of such a "meaningless" action (Sol/B11/i). This may indicate either their pragmatism or a lack of strategic awareness. Solicitor B2/i suggested that after a no comment interview he might hand in a statement at charge as some officers only make disclosure during the interview and then refuse the suspect the opportunity to comment later.

Maintaining silence in an interview is psychologically difficult. Many suspects are concerned about appearing uncooperative to the police by remaining silent (McConville and Hodgson, 1993). Those legal advisers who discuss strategies with their clients tend to advise them to say "no comment" rather than to maintain absolute silence, as this is more difficult. Some legal advisers 'train' suspects before the interview:

> "Put your hands under your legs, sit on your hands and look at the ground and don't make eye contact." (Sol/A13/iii)

> "'Have you got a mum?' 'No comment.' 'Are you wearing a white hat?' 'No comment.'" (Sol/D13/ii)

Many legal advisers described incidents in which they had advised their clients to make no comment but they had been unable to maintain this. It may be that the suspects who are best equipped to make no comment are the 'old lags', those who do not have a good relationship with the police or those who belong to a family or community where co-operation with the police is disapproved of:[68]

> "He was the type of person who thinks 'I'm big in the area I live' – and he's

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66 See C. Passmore (1998) *Privilege.* London: Central Law Publishing; *Derby Magistrates Court, ex parte B* (1995). The case law is discussed in Chapter 5.

67 This can be done if no comment has been advised in response to inadequate disclosure or if the police have enough evidence to charge anyway. The statement may be used at trial in order to rebut any inference of subsequent fabrication. It may also be useful if it is thought that the suspect would be unable to answer questions precisely enough to avoid saying something incriminating.

68 A legal executive recounted an amusing anecdote about a petty criminal who, having read a book about the tactics employed by the IRA to withstand interrogation, would zip up his anorak over his face and face the wall so that the police could not 'break him down' (LE/B8/i).

> not! But he thinks he's Mr Al Capone." (LE(P)/F7/i)

A sergeant I interviewed from Area A2 thought that the proportion of no comment interviews was lower in his present station than his previous one [F2] because:

> "The people are a lot more friendly over here and they'll talk to you more. The [A2] people, they'll come in and they'll admit everything they've done, they don't deny anything!" (PS/A4)

A number of police strategies for dealing with silent suspects have been identified. McConville and Hodgson (1993) expanded upon Moston's (1990) typologies to show the different responses that the police employed before the CJPOA: abandoning the interview; downgrading (asking questions about anything, such as their home life); persistence; upgrading (intimating the strength of the case against the suspect); rationalisation (used in almost one third of cases where the investigator tries to dissuade the suspect from their strategy); direct accusations; interpreting non-verbal behaviour; and marginalising the adviser.

The legal advisers I surveyed expressed the view that the most common tactic that they saw was downgrading, ("how's the wife?"), or repetition of the caution, which emphasises its coercive nature. Some officers seek to undermine the representatives' advice by saying that the Court of Appeal has held that suspects do not have to follow legal advice to remain silent (LE/B1/ii). One-third of the police questionnaire respondents suggested that they would advise silent suspects that it was in their interests to speak. One interviewee described trying to provoke suspects into reacting:

> "You ask something that either upsets them enough or irritates them enough or, just to get them to say something... You might even be a little bit personal, perhaps, without being oppressive or rude or anything. You might just toughen up the questions a little bit. Try and sometimes just make them look a little bit foolish sometimes works... Say or suggest things that you know they're going to disagree with and you know they want to shout at you and say 'That's not true!' or whatever, and if that works, great... perhaps playing a bit dirty and trying to upset them or, you know, just spark them into life, but procedurally, using special warnings and a caution has no effect on someone who doesn't want to talk to you." (PS/A3)

Most police officers declared that they would continue to put questions to suspects so that the courts would be able to draw adverse inferences from a suspect's refusal to answer questions (71% of questionnaires). They were aware that if they did not, suspects could use this as a 'get out' at court (PS/A4). The police can make a no comment interview a record of their version of events by asking questions to which silence appears a particularly incriminating response, such as "Are you responsible for this offence" or by making statements about what they think happened (DS/A6). The suspect has no chance to "steer" the interview as they could if they were putting forward a version of events (Sol/D9/iii). Some officers admitted how discomforting they find silence. Particularly those newer in service are still "flummoxed" by an unresponsive suspect (LE(P)/C4/i) and abandon the interview (PS/A4; 5% of questionnaires):

> "I absolutely love it because they haven't got a clue what to say or do. More often than not, they don't even put half the questions which they should do." (Sol/D13/ii)

A police officer from Station B who refused to be interviewed declared, deliberately within my earshot, that if suspects make no comment in his interviews, he refuses to give them a second chance to answer, as though not being allowed to answer his questions were a form of

punishment for their recalcitrance (Sol/B2/i agreed). This may be the case, of course, if inferences are drawn subsequently. Other officers are more phlegmatic, believing that they are in a no-lose situation now; either the suspect confesses, or inferences can be drawn from silence (Jackson *et al.*, 2000):

> "I'm changing from information gathering to giving him an opportunity to say things and if he chooses to give up that opportunity, that's his loss, not mine." (PC/A7)

> "I would thank the offender for not answering my questions and I would explain to him that in my view all he was doing was strengthening my case and then give him another opportunity to talk." (Q7/PC)

The right of silence had been suggested as a contributing factor to "noble cause corruption" (RCCJ, 1993) and the CJPOA is seen by many as having curtailed police malpractice. The police no longer 'need' to obtain a confession, the pressure on suspects now comes from the law rather than an unauthorised cell visit:

> "I think the change in the law has helped somewhat because they think it doesn't really matter to them whether they answer questions or not, that's the point. Because that's the way the culture of the police officers is: if you answer questions, that's fine. If you don't answer questions, that's equally fine, because we've got you anyway because you didn't answer questions. So, for them, instead of it becoming a mission to get you to cough [confess], it just means, well, either way, there's an inference that you're guilty, so there's less pressure." (Sol/B2/i)

Before inferences may be drawn under ss36 and 37 of the CJPOA, the suspect must be informed in "ordinary language," of the consequences of failure to provide a satisfactory answer; a special warning. The police may use special warnings, asking suspects to account for incriminating objects, marks or substances (s36) or for their presence at a particular place (s37) as another tactic "really designed to oppress or worry them" (LE(P)/A12/i) to persuade suspects to speak. PS/A3 admitted that special warnings probably had been used inappropriately at first, as officers had not been trained properly in the use of them:

> "Most of them don't have a clue when to use it... They've used it because the IP [injured party] had got a cut, so they said 'Therefore that mark incriminates your client, special caution'." (Sol/A13/iii)

> "Intervening, it's usually on special warnings because the police haven't got a clue on them. 'I'm giving you a special warning because you're not explaining yourself.' 'Officer, he's denying it, he has explained, what else can he explain?'" (Sol/B10/i)

Three quarters of questionnaire responses suggested that officers would use special warnings if a suspect remained silent, although many added "only where appropriate." They are not used a great deal. Seventy-three per cent of police interviewees replied that they used special warnings only rarely; 8% of officers said they never issue them. They may be used in cases that are more serious; one barrister considered that in the cases he sees where a suspect has made no comment a special warning is "invariably" given (Bar/B3). Bucke *et al.* (2000) found that special warnings were given to 39% of suspects exercising either full or selective silence and to 7% of suspects as a whole. They are most likely to be used in interviews relating to offences of burglary, violence, robbery and drugs. Special warnings are not particularly persuasive: 40% of police questionnaires responded that suspects never give an explanation after a special warning. Bucke *et al.* (2000) reported that after a s36 special

warning 70% of suspects gave no account of the relevant object, substance or mark, 11% gave an account that was unsatisfactory to the police and 19% gave a satisfactory account. Even fewer suspects yielded to a s37 warning with 77% giving no account of their presence, 10% an "unsatisfactory" account and 13% a satisfactory explanation. This may be because those who have reached the stage of getting a special warning have made a deliberate decision to remain silent and are psychologically strong enough to maintain this position. One police officer lamented that:

> "Special warnings are not strong enough, not worded harshly enough to worry suspects." (Q96/PC)

Jackson *et al.* (2000) found that special warnings were used in a "finely tuned" manner in Northern Ireland. Article 3 warnings (the standard caution) were described as "sledgehammers" that were used in every interview but the detectives would sometimes debate between themselves whether or not a special warning should be given relating to Articles 5 or 6. None in my survey described such deliberations but some did consider the implications of using it selectively to strengthen the prosecution's case:

> "It's another tool which you can use in trying to get the true course of events... It is the sort of 'reasonable man' test, if you like, Mr Joe Average outside would think 'that's ridiculous'... If they don't give a version we can use the special warning, or if you're not satisfied with their version. That is a little bit of a grey area... I can't say it is something that I use often because invariably they will give a version. Rather than let them explain that, if you let that run, when it goes to court, it can actually be seen for the ludicrous situation that it is, shall we say, because if you suddenly go 'Hang on, special warning, I don't believe you, what you've just told me, that is a complete fantasy, special warning' they may then change that to a more credible version." (DC/A5)

Custody sergeants are not supposed to take a suspect's silence into account when deciding whether or not to charge. Two officers thought that it would make no difference; as with confession evidence, it was seen as the "icing on the cake" (PC/A8). Some officers contended that not answering the reasonable suspicion that the police had when arresting the suspect, left a case to answer:

> "Allegations and evidence and no comment, then that is a *prima facie* case." (DS/B4)

The impact of the changes to the right of silence on the progress of interviews has clearly been dramatic but may have diminished as advisers realised that making no comment does not always disadvantage their clients (LE/B1/i). The effect on the outcome of interviews is less clear cut. Bucke *et al.* (2000) found no change in the 55% of suspects making confessions. Assuming no change in the proportion of guilty suspects arrested, this might indicate that suspects who previously would have remained silent, instead simply deny the offence or give a version of events that is either false or inscrutable (of the 'I bought it from a man in a pub' variety). This would support the argument that the most vulnerable suspects, who would be most susceptible to the increased pressure of the new caution, did not use the right before the changes anyway. It was mainly the more robust suspect who could make no comment and they are resourceful enough to be able to give instead an account of themselves that is unlikely to advance police enquiries. The other possibility is that suspects who previously made no comment because they were innocent or against whom the police had insufficient evidence may now answer questions and still be released without charge. The charge rate for suspects making no comment has fallen from 70% to 64% (Bucke *et al.*, (2000) and there was

little difference in the numbers receiving cautions.[69] The charge rate for suspects answering all questions remained at 50%. This may be due to no comment now only being used tactically in cases where the evidence is weak. The use that is made of these interviews at trial is discussed in Chapter 5.

3.7. Conclusion

The protections offered to suspects in custody by PACE are undoubtedly an improvement on the common law. They fulfil different purposes to the right of silence, however, and should not be regarded as a substitute for it. This right of silence was not solely a protective measure. It was also a practical expression of the principle that it is for the prosecution to discharge the burden of proof, without assistance from the accused.

The suggestion that the right to legal representation gave suspects an unfair advantage over the police was demonstrably flawed. Only a minority of suspects was legally represented and the quality of much of that representation was, and remains, poor. Legal representatives are hampered further in their protective function by their lack of authority at the police station. The police are 'gate-keepers' of suspects' rights and can circumvent or minimise the protective benefits of many of these protections. The PACE safeguards are tempered by the lack of effective checks on the exercise of police powers or of any effective sanctions against the police for breaches of the regulations. The refusal to answer police questions was hitherto the only effective sanction that suspects and legal advisers had in response to the police either abusing their powers or acting beyond them, this now has evidential risks.

The police are culturally adversarial. They were hostile to the right of silence, perceiving it as a challenge to their authority and as an impediment to the achievement of results. Whilst police conduct in interviews appears to have improved, the CJPOA reinforces the attitudes that PACE was intended to change. The police have been criticised for fulfilling their obligations in a manner which frustrates the spirit of PACE; these Acts effectively do the same. The protective benefit of legal advice, a fundamental requirement of a fair trial, is devalued by the quandary in which the legal representative is now placed. The effects of this are explored further in Chapter 5. Whilst the direct effects of the Act have been limited by the relatively small numbers of suspects making no comment hitherto, it is the effect upon legal representation that has shifted the balance of power in custodial interrogation further in favour of the police.

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[69] In Northern Ireland, between 1990 and 1995, 38% of terrorist and 6% of non-terrorist suspects remained totally silent or refused to answer relevant questions. This appeared to make less difference to the ability of the police to proceed against terrorist suspects. Charges were pressed against 30% of terrorist suspects who remained silent, compared to 37% of those answering police questions. The figures for non-terrorist suspects were 29% and 86% respectively (Jackson *et al.*, 2000).

Chapter 4: The Disclosure Regime under the Criminal Procedure and Investigations Act 1996.

Scrutiny of the disclosure provisions was initially a secondary part of this thesis but it emerged quickly that they caused greater practical concern than the changes to the right of silence had done. Proponents of the CPIA relied upon the same rhetoric of criminals ambushing the prosecution and exploiting the system to evade justice, as had been deployed in support of the CJPOA. Critics of the legislation also raised similar objections to those advanced against the CJPOA: that it eases the burden of proof on the prosecution, impinges upon the privilege against self-incrimination and uses (potential) evidence as a sanction. There was little evidence that managing prosecution disclosure had caused the prosecution difficulties, other than in a minority of cases. No analysis was made of the impact of the CJPOA before the CPIA was introduced. In reducing the disclosure obligation upon the prosecution and making it contingent upon defence disclosure, the legislation alters fundamentally the pre-trial balance of information. It puts a further quasi-inquisitorial burden upon the defence. Whilst disclosure does not have the symbolic resonance of the right of silence, it was known to have been a feature of a number of wrongful convictions.[1] The CPIA has increased this potential for injustice whilst making it less likely that exculpatory evidence will be uncovered, thus reducing the likelihood of any wrongful convictions being exposed.

The mechanics of the disclosure regime are set out in detail in Chapter 1. To recap, the investigator, usually the police disclosure officer, has responsibility for retaining, recording and classifying all relevant unused material on either a 'sensitive' or a 'non-sensitive' schedule. The schedules are sent to the prosecutor who decides what, if any, of the material listed might undermine the prosecution case. Any potentially undermining material, together with a copy of the non-sensitive schedule, is made available to the defence as Primary Prosecution Disclosure. The defence is then obliged to outline its position by submitting a defence statement within the next fourteen days. Comment may be made at trial and inferences drawn if the statement is late or not submitted, diverged from at trial, or contains insufficient detail of alibi or witness evidence. The investigator should review the unused material to advise the prosecutor of any material that supports the stated defence; this is then disclosed as Secondary Prosecution Disclosure.

Criticism of the CPIA was immediate, vociferous and widespread. When David Calvert-Smith became Director of Public Prosecutions in 1998, he made "scrupulously complying with the duties of disclosure" one of the objectives of the CPS. He expressed concerns that:

> "Innocent people will be convicted. Guilty people will be acquitted by juries or judges, or have their convictions quashed on appeal because of late disclosure which turned the jury or judge against the prosecution" (CPS press release 118/99).

The Attorney General consulted widely before issuing guidelines (29th November 2000).[2] The CPS Inspectorate produced an excoriating thematic report on the subject. It found that

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[1] See Chapter 1, footnote 56.

[2] These provided that the prosecution should supply the defence with all the evidence upon which it proposes to rely in summary trials; give open access to all material seized but not examined by investigators and automatic disclosure of certain categories of material following receipt of an appropriate defence statement. Investigators should err on the side of recording and retaining material and any doubts should be resolved in favour of disclosure.

criminal practitioners outside the CPS had an "almost universal lack of faith" that the system was working satisfactorily (CPSI, 2000, para. 3.38). Home Office commissioned research found that the Act had not achieved its aims (Plotnikoff and Woolfson, 2001). The Criminal Bar Association reported that 84% of barristers were dissatisfied with how the provisions were working, citing numerous examples of bad practice and potential injustice (BAFS/CBA, 1999). The corresponding Law Society survey amongst solicitors concluded that there is:

> "Clear evidence that the CPIA is not working... police and the CPS approach disclosure in the wrong spirit – determined to disclose as little as possible." (1995).

For their part, prosecutors complain that schedules are incomplete, material is not sent to them, disclosure officers are difficult to contact and defence statements are cursory. The police consider that attempts to encourage them to be objective and fair are undermined by the partisan conduct of defence teams (Phillips, 2001).

This chapter demonstrates how, in principle and in practice, the CPIA runs counter to the adversarial nature and working cultures of the system. It considers each aspect of the scheme, demonstrating the inherent flaws at each stage caused by the failure to consider "the radically different participant perspectives" (Plotnikoff and Woolfson, 2000:141). The Act requires the culturally adversarial police to fulfil an effectively inquisitorial function, prosecutors to view material from a defence perspective and the defence to act in the interests of the administration of the system rather than of their clients. The RCCJ dismissed the idea of adopting a wholly inquisitorial system due to the risks involved in such a "cultural transplant" (1993:3-4). No consideration was made of the risks of the cultural grafting of the inquisitorial[3] elements of the CPIA regime. These are posited upon a degree of trust between the protagonists that my findings show is unrealistic and, in some cases, is itself undermined by the provisions.

As with the right of silence provisions, the statutory requirements of the CPIA have been adapted and implemented according to the occupational practices of those responsible for their execution. The subjective nature of the tests means that there is great individual, regional[4] and inter-agency[5] variation. The CPS and ACPO issued guidance in March 1997[6] (Joint Operation Instructions – Disclosure of Unused Material (JOPI)), to assist prosecutors and the police and to achieve consistent practice. The analysis of the conduct and attitudes of defence solicitors and the police, begun in Chapter 3, is developed in this chapter in relation to the CPIA provisions and is extended to barristers and Crown Prosecutors. The administrative burden the Act imposes has led to routinised, minimal fulfilment of its requirements and the delegation of critical tasks, by both prosecution and defence, to non-solicitors. An informal system of disclosure has emerged amongst those who believe that the formal system cannot be effective. The CPIA has resulted in little case law. It appears that,

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[3] The CPIA provisions have been described as inquisitorial in nature. Elements of it are but inquisitorial systems do not make prosecution disclosure contingent upon defence disclosure (see, for example, Hodgson, 2001).

[4] "It can hardly be right for the extent of disclosure to be dependent on geography" (CPSI, 2000, para. 1.14). Local initiatives have attempted to reach a practical accommodation within the provisions. The Pan London Agreement is a formal example of this. Launched on 28th November 2000 by the CPS, Metropolitan Police and City of London Police, and endorsed by the Criminal Bar Association and London Criminal Courts Association, it provides minimum standards of practice and requires the automatic revelation of certain material.

[5] "Customs are probably even more extreme than the CPS in terms of disclosure... [Serious Customs cases], whether it's drug or revenue evasion, involves probably more undercover work and confidential material and so they're much more secretive about their methods anyway" (Bar/B14). See also Plotnikoff and Woolfson (2001, Ch. 11).

[6] An updated version was issued in mid-2003. All references are to the earlier version.

either relevant material is disclosed, or it is not known about by the defence, prosecuting counsel or sometimes even the prosecution. The unrelenting changes in the criminal justice system have also influenced the operation of the Act. File preparation time has been curtailed by expedited magistrates' court hearings and the sending of indictable only offences to Crown Court at the first hearing (s51 Crime and Disorder Act 1998) as well as by initiatives to reduce the time taken to bring, in particular, young offenders to court. This chapter concludes that the Act cannot be made to operate within the context of an adversarial criminal system and within prevailing occupational cultures which work in clear opposition to the objectives of the Act. It has increased the pressure on suspects to cooperate with proceedings against them and heightened the risk of wrongful convictions occurring.

4.1. Cop Culture and The Disclosure Officer

This first stage of compiling the schedules is fundamental to the disclosure scheme: a "pivotal role" (Leng, 1997:218) for which the police "are not equipped by intellect, training or culture" (SCP/A5). Chapter 3 described how police investigations may be structured in order to construct cases against those whom officers consider to be guilty (McConville *et al.*, 1991). This selectively gathered evidence may be filtered further by the CPIA provisions. The duty to investigate created by the CPIA (s23(1)(a)) has received little attention and is not explored here, but it influences the material that is retained.[7] Concern has been expressed that 'negative' material is not identified, such as fingerprints which might point to the involvement of another suspect, and that the police do not follow up lines of enquiry that might undermine the prosecution (CPSI, 2000, para. 4.103).

The investigator must retain all possibly relevant material obtained in the course of an investigation (CoP, para 5.1). If an officer is unsure whether an item is relevant to the investigation, the prosecutor should be consulted (JOPI, 2.54). Such overly bureaucratic instructions seem likely to bring the regulations into disrepute with over-worked staff from both agencies. Whilst the provisions were intended to reduce the amount of irrelevant material that has to be included, it is premature to filter material at a stage where investigations may be incomplete, the prosecution case is not finalised and the defence is unknown. The relevance of material may change as the investigation progresses:

> "That's quite a burden to put, certainly on a police officer. Because at that time, he doesn't really know what the defence is going to be, so it's really guesswork to a large extent." (EO/C3)

The officer in charge of a case must ensure that all reasonable enquiries are pursued, that procedures exist for recording and retaining material and that a disclosure officer is appointed and given access to all available material (JOPI, 2.4). The disclosure officer is "the person responsible for handling the administrative side of disclosure during a criminal investigation" (JOPI, 2.7). This significantly underestimates the role as it stands but it may provide a more appropriate alternative model (discussed below). The JOPI assumes that it is only in "some cases" that a disclosure officer will be appointed at the start of an investigation. The schedules would serve more purpose as a management tool, as well as being more likely to be complete, if compiled from the start:

> "Enquiries can start sort of six, twelve months, even longer before they

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[7] In *DPP v Metten* (1999), the Divisional Court held that failing to take the details of civilian witnesses to a public order incident did not breach para. 3.4 of the Code of Practice. Because the offence was committed in the presence of the officer, no investigation into whether or by whom it was committed took place.

> actually come to fruition[8] and if you, you know, you're trying to do other things at the same time it can become a nightmare. But if you don't do it it'll come back to haunt you... The problem is the continuity of the officer that's delegated to do it. On a big enquiry, if you're away for a couple of weeks, things happen, 'Well, where's the copies?"' 'Oh, I don't know.' He's ripped them off and thrown them away." (DC/A9)

Neither the Act nor the Code specifies who should act as disclosure officer. The role may be undertaken by a designated disclosure officer, the officer in charge of the case, the arresting, investigating or exhibits officer, or a civilian. Although the Code provides that the functions of the investigator, the officer in charge of the investigation and the disclosure officer are separate (para. 3.1), one officer may fulfil all of these positions. Ultimately, only one person signs the disclosure certificate but in a large investigation, more than one person may act as disclosure officer. Disagreement exists as to whether the disclosure officer should be involved in the investigation. It may be argued that somebody involved in the case cannot be expected to analyse the evidence impartially:[9]

> "You can't expect a police officer to go through the evidence file [and say] 'does that undermine the case', 'look here's your line of defence'. You're an officer who's been working on a case with his buddies for eighteen months, twelve months and suddenly something crops up... you can see how it's going to be dealt with." (PCP/C9)

Alternatively, an investigating officer will know what material exists, the details of the case and should appreciate the significance, or lack thereof, of all the unused material. One barrister, describing a case that had collapsed when an undisclosed video emerged, observed the futility of an officer reviewing the material when he did not know what the defendant looked like (Bar/B5):

> "A very complex case involves lots of different characters and relatives and [people] having the same surnames, you know, particularly ethnic minority cases. Somebody who isn't involved in the case couldn't possibly do it." (Pupil-Bar/B5)

> "The disclosure officer is often an officer from the Criminal Justice Unit[10] rather than an officer in the case so we're relying on the fact that he's made sure that he's got access to all the unused material." (SCP/C4)

Parallels may be drawn with the problems that custody officers have in being reliant on the investigating officer's account when deciding about detention and charge, as described in Chapter 3. Some concern was expressed that occupational loyalty dictated that no police officer, whether or not they were involved in the case, could be sufficiently objective, particularly if they worked alongside the investigating officers:

> "Are Disclosure Officers so close to the... investigating officers that they're on first name terms with them?" (Bar/B8)

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[8] An investigation into an offence for the purposes of the Act includes proactive investigations into planned offences (JOPI 2.22; *Uxbridge Magistrates' Court, ex parte Patel* (2000) and *City of London Magistrates' Court, ex parte Cooper* (2000)).

[9] The *Attorney General's Guidelines* (2000) state that officers should not act as disclosure officer if they have a conflict of interest, such as if the defence is that the officers involved acted improperly or the officer is the injured party.

[10] Also known as Administrative Support Units or Administration of Justice Units. In Region X there had been one CJU for each division. These were recently devolved to station level.

The responsibility of acting as disclosure officer is not one that is welcomed by officers. The job is onerous, time consuming and of low status:

> "Nobody in their right mind would volunteer to be disclosure officer. I was a pressed man!" (PS/B2)

> "It really can be the worst job in the world on something where the files are this height, you know, a foot high." (DC/A9)

> "He just happened to be in a briefing room when they decided that they didn't have a disclosure officer... He didn't feel particularly comfortable with the situation that he had been put in." (PCP/C9)

Region X operates a system whereby in most cases, the officer in charge of the case prepares the schedules:

> "Your day to day stuff where you've got a guy left in for robbery or whatever, whoever ends up putting the file in, tends to end up as the disclosure officer under the umbrella of everything else." (DC/A5)

The papers are then passed to the Criminal Justice Unit (CJU), where the case builders, a dedicated group of officers, "get all the information together, put the cases together to submit to the CPS for court" (CJU/B1). Officers are expected to submit the files to the CJU within twenty-four hours of arrest (PC/A8). Although many files contain little more than pocket notebooks, custody records and witness statements, this indicates the administrative and time pressure under which the police work:

> "The pressure is on when it's a remand file. Whereby it's one o'clock in the morning, you've been on since 8 o'clock in the morning and we've got to get the file prepared for that guy to go to court for 9 o'clock in the morning. You then have got to deal with the MG6s [the disclosure schedules], more forms!" (DC/A5)

The police seemed very vague about the practicalities of disclosure and it was not clear, even after I had interviewed beat, CID, disclosure and CJU officers, exactly who did what. None of them had seen the defence statements, (which they are supposed to review to consider secondary disclosure). The CJU officers said that they list all the material for the CPS and leave it to them to decide what to do with it. They appeared to see their role solely in terms of preparing the prosecution file to a high standard and had little understanding of what the disclosure provisions entailed:

> "We tell CPS everything and the CPS decide whether they're going to tell it to the defence. That's obviously our responsibility. We are supposed to make sure that CPS are fully aware of every piece of or scrap of information that exists. Sometimes it's to the advantage of the defence... we wouldn't, I think the expression is 'cherry picking.' We send it all through and let CPS decide." (CJU/B2)

Despite repeated questioning, the CJU officers did not seem to know what was meant by the test for 'undermining the prosecution's case.'

> "I think that's an oversimplification. What we do is we basically look for everything. We try and obtain as much information as we can. Obviously it is a question of putting the file together as completely as it possibly can be, and

> obviously its, CPS will work on a principle that if somebody is mentioned in a statement, they will want a statement from that person... You end up going out trying to cover all the points that you can possibly get to... The best way of describing it is probably dot-to-dot, that's what you do, you follow the line of enquiry until you've either got a picture or you haven't." (CJU/B1)

A decision had been taken just before my interviews were conducted to abolish the CJUs and to give arresting officers responsibility for file preparation and disclosure. One benefit would be that officers attending court would know the case thoroughly (DC/A5) but several officers expressed reservations. Practical problems were envisaged, for example, in communicating with the CPS or witnesses when the arresting officer is on leave or working on nightshifts. Most thought that the quality of files would diminish, resulting in cases being 'lost', as no officer with fewer than ten years service has experience of fully preparing a file:

> "There have always been experienced police officers that are very good at arresting people but they're very poor at putting in the paperwork... Some of these younger in service officers have never been trained to do the paperwork properly and therefore they will be very, very frightened if it all goes back to them... It's going to be a very mean standard because it will fall to the lowest level and that's for sure. I think the CPS are very much against this idea and I would totally agree with them. It's barmy." (CJU/B2)

> "The average bobby on the street who's now going to be preparing his file will not have a clue, he won't know how to do the file, they've never had to do them. I think it's a recipe for disaster." (PCP/C7)

> "You're going to have substandard quality. I mean pity the poor sergeant who's got to go through all this stuff... I've got to sit and read through at least fourteen files... it's a nightmare, it's just impractical." (PS/A3)

The administrative burden imposed upon the police by the CPIA is onerous. Every case requires the completion of at least five 'MG6'[11] forms regarding unused material. No provision is made in the Act or the Codes of Practice for independent scrutiny of the "largely unauditable decisions" (Heaton-Armstrong, 1999) about what goes on these schedules. The Joint Performance Management criteria of file quality, agreed between the CPS and the police, do not include the disclosure forms. Training about the disclosure regime was criticised as inadequate and scheduled wrongly into an ordinary working day:

> "Four hours lecture and like okay I'm sitting there listening but I've got somebody in the cells who I've perhaps got to interview, as soon as I finish this I've got to go and unlock somebody. Four hours was the maximum input I had on disclosure, and I would be the first to admit my grasp of the disclosure isn't as good as it ought to be." (PS/A3)

The MG6 'Confidential Information' form requires the officer to assess the strengths and weaknesses of the case. Details should be included of others who are or who have been suspected, charged or cautioned for this incident; those who refused to make witness statements, material held by third parties and background information including "matters of local interest" and details about victim and witness care. Any comments, observations or explanations about the contents of the schedules should be on this form (JOPI, 2.49).

Form MG6B requires details of disciplinary findings against police officers involved with the

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[11] Police files are prepared in accordance with the national Manual of Guidance (MG). Further guidance on the completion of these forms is provided in the JOPI.

investigation (negative findings should be listed on the MG6). The CPSI was dissatisfied with the recording and description on this form (para. 4.152-3). One detective described an armed robbery case involving forty officers, including a tactical firearms team, to illustrate how administrative demands and his lack of understanding of the relevance of this task had led him to simplify matters:

> "It's physically impossible, short of going round each individual saying 'have you got any disciplinary hearings or anything?' So what you do is just do the officers you work with and put the form in. That's perhaps not how it was envisaged but when you've got a large enquiry like that. With tactical firearms, there's about twelve guys that have put suitable statements in. Now I don't know them, they work over wherever they work and they've come out, they've arrested the guy at gunpoint and they've put in the statements accordingly. So that in itself could create a problem and ethically, you could argue that as disclosure officer I would be obliged to do that. It doesn't tend to happen in practice. In itself, it is an example of where it has created more work. It is just another form that we have to fill in. I don't think [officers] from our level perhaps tend to understand the implications of it if you like, it's just another form we've got to fill in, let's fill it in." (DC/A5)

The MG6C, the schedule of non-sensitive unused material, is the only schedule that the defence sees. Each item should be numbered sequentially, described and located. Plotnikoff and Woolfson (2001:29) found that 73% of MG6Cs described material poorly. Almost one third of prosecutors complained that the schedules were presented in the form of acronyms and codes (JOPI, para. 2.56; *Attorney General's Guidelines*, para. 10):

> "We all know what P & Ds are and WD208s and that sort of thing. It's the actual content of the documents that you're not quite sure of. You can identify the document but not necessarily the content." (EO/C11)

The CPSI found that the MG6C was defective in 38.5% of cases, most commonly for giving insufficient detail (22%) or omitting material (12%). Even after corrections were made, 7.9% of cases proceeded with items missing from the schedule (para. 4.30-4.32). The Inspectorate considered that if the schedules contain sufficient description then it would not be necessary for prosecutors to examine the items (para. 4.52). If the officer decides that the material should not be given to the prosecutor or revealed to the defence, the schedule is unlikely to portray the material in such a way that attracts attention. Expecting a police officer to identify material that undermines the prosecution case has been condemned as unrealistic:

> "The police are very partisan, they're all entrenched. If it doesn't point to the defendant's guilt then it's unused material, and they don't seem to realise that if it doesn't point to the defendant's guilt, if it points to someone else then that can be undermining." (EO/C3)

> "What a policeman, with respect to the police, might see as undermining the prosecution's case and what might in fact undermine the prosecution's case are two entirely different things... the wrong person is being asked to make the first decision... An officer might say "Well, yes, Smith, Jones and Bloggs were there but they said that they didn't see anything..." Fine. That doesn't on the face of it undermine or help one way or the other but who knows what Smith, Bloggs may actually have said if approached by the defence." (Bar/B1)

The MG6D requires the same details for sensitive material; it also has a column for the police to describe the reason for sensitivity and a column for the prosecutor to agree or disagree with

this assessment. Sensitive material is classified as such by the disclosure officer, after consultation with the officer in charge, as that which it is not in the public interest to disclose (para. 2.1). No attempt is made to define the public interest. Para. 6.2 gives categories of material that 'may' be considered sensitive, including internal police communications and material upon which search warrants were obtained. These examples are much wider than the common law definition of Public Interest Immunity (PII) issues in criminal cases, making it easier for the prosecution to withhold disclosure unless there is some clear relevance to the defence:

> "...if we've got information from an informant that the defendant has been involved in crime, that doesn't undermine the case, it doesn't assist the defence, it helps us. Since the new provisions, it has made it a lot easier to say 'we don't need to disclose that,' I mean it has helped us like that." (BCP/A10)

The most draconian development is the inclusion of material given in confidence to the police. This could encompass anything should the police, a witness or owner of the material request it be treated in confidence. Notions of case construction and cop culture suggest that the police are likely to interpret such a subjective test widely. The police I interviewed appeared to define sensitivity very broadly, most commonly to protect witnesses:

> "Some officers will put daft things like the crime report, just because it's got the person who 'phoned, their phone number and address on it, when we can just put a black pen or Tippex through it and put it on the ordinary." (EO/A12)[12]

One CID officer described how the sensitivity of witness details could be used to avoid disclosing material, in order to strengthen the case against a suspect:

> "There may also be information on that crime report and when you read it, you think 'ooh'. A policeman has attended and he has put down an innocent comment on there like 'the witness would never recognise these people again'. When in actual fact, you've taken that one step further and you've gone on to hold an identification parade and that witness has picked that person out. You could argue that could be detrimental to our case but because it contains other information like their address, you would put that down 'not to be disclosed'. And then let the CPS make the decision as to whether they think that information is relevant or not." (DC/A5)

Unless the prosecutor asks to see the crime report, there will be nothing to indicate that such a potentially significant statement is contained in this document. The CPSI found the MG6D was defective in 21.5% of cases involving sensitive unused material; half were insufficiently described.

Material attracting PII is still governed by the common law. Such applications predominantly relate to informants in drugs cases and social services' records in child sex abuse cases. Few of my respondents had experience of PII procedures. Consultation regarding highly sensitive material should take place between the Branch Crown Prosecutor and a police inspector. This division of responsibility is dangerous as the disclosure officer and the reviewing CPS officer cannot assess the relevance of other unused material without knowing the details of material that has been withheld. A disclosure officer (B2) said that he only tells the prosecution an 'edited version' of PII material. This verges on malfeasance and indicates the extraordinary suspicion with which the some police officers regard the CPS. The CPIA was intended to

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[12] The JOPI gives instructions for editing material that is sensitive by virtue only of an address or telephone number (para. 2.83-5).

reduce the number of PII applications (see *Archbold News,* February 10, 1997:8), as they would only be necessary if the information were relevant. This is impossible to assess as no national statistics are compiled on the number, type, basis or outcome of PII applications.[13] A few interviewees agreed that there had been a reduction:

> "When it first came out there were more because the defence were trying it on I think. They were trying to get details of informants and things and there were lots of PII hearings and judges were saying 'no, you can't have this' and probably since those cases, the defence thought 'Oh it's not worth it, I know I'm not going to get this. I can't show that I need it for my client to give him a fair trial'." (SCP/C2)

Support for this proposition was not widespread however. Developments such as increased intelligence-led policing may have counteracted any effects of the CPIA.

The MG6E, introduced in October 1997, contains the confidential disclosure officer's report. This has to be completed once to highlight material that should be revealed as part of Primary Prosecution Disclosure and again for Secondary Prosecution Disclosure. The officer has to indicate on which schedule the item is listed and the reason it fulfils the tests, then sign and date the report certifying that:

> "To the best of my knowledge and belief, all material which has been retained and made available to me has been revealed to the prosecutor in accordance with the Criminal Procedure and Investigations Act 1996 and Code of Practice."

The median number of items listed on the MG6E schedule was 2.3 (Plotnikoff and Woolfson 2001:32). In 4.3% of cases, material which should have been on this schedule was omitted (CPSI, 2000, para. 4.90). In 5.9% of cases, no report was provided drawing the attention of the prosecutor to material that may fall within the test for primary disclosure (para. 4.77-8).

Material is frequently not cross-referenced between forms: 24% of reports identifying unused material to be disclosed listed material that was not on an MG6C or D (Plotnikoff and Woolfson, 2001:33). The omission of relevant material from the correct schedule was a frequent concern of prosecutors in my own research. This may be due to the overwhelming volume of documentation in big investigations; failure to appreciate the potential significance of material to the defence; or mendacity:

> "They sign that and then they'll say 'Oh by the way, on the MG6, there's an informant or 'there's observation points' or something that may undermine the case but its not on that E or anything. They don't know how to use it I don't think... they don't understand the forms, they just sign them as though they were anything. I don't think they understand their responsibilities as disclosure officers." (PCP/C7)

> "They put 'nothing undermines the case' and yet I've got three statements that support the defence... I think they're of the opinion 'We've sent the statements in so why do we have to put it on that one?' (SCP/A8)

> "The police slap anything down. I think they just think 'we don't want them to see that' so they put in on an MG6E." (EO/C10)

The disclosure officer must keep all retained material under review. The MG6C is often

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[13] Yet another example of the tenuous evidential basis for the changes.

completed before the enquiries are concluded and revised schedules have to be submitted (Plotnikoff and Woolfson (2001) found twelve in one case). The items on the earlier schedules would, in theory, need to be reviewed in the light of the new material that has emerged in these cases. It seems unlikely that this is how the system operates in practice. Unexpected issues may arise when the trial begins which may make previously unused material relevant; for example if witnesses change their accounts or raise new issues. The disclosure officer will probably be unaware of issues raised by the defence during the progress of the case. Responsibility for creating and maintaining the schedules remains with the disclosure officer. If changes are required, the prosecutor must not make them but should return the schedules to the disclosure officer for amendment. Disclosure can, however, be made in the interim (JOPI, 3.29).

> "The theory is that what we should do is when we get a schedule that is incomplete, send it back, say why we think it is incomplete and get the police to do a new one. But because of the pressures that we work under, there is never enough time to do that. So you end up sort of bodging it yourself, or, I tend to do a separate letter to the defence saying 'look, there's *x*, *y* and *z* that's not on the schedule and tell them what my views are of it." (SCP/C8)

The schedule exists as a tool to assist the prosecutor; as such, they should be free to adapt it according to their needs. Such a convoluted procedure misunderstands the roles of police and prosecutors and the relatively linear nature of the criminal process. Once the police have submitted a file, they have little interest in further paperwork:

> "The police, quite properly, have a rush of enthusiasm to investigate matters. Then they nick the man or woman, interview them and charge them and then the trail goes cold and they go off and do something else. By the time we get hold of it, a lot of time has passed and it's rather difficult to motivate police to go around and look into things that might actually not help us very much." (Bar/B1)

> "It's gung-ho stuff: 'I've arrested him and I don't want to know about the paperwork.'" (PCP/C7)

Some agreed with the RCCJ that giving the police specific responsibility for disclosure had improved their performance. One sergeant said that because officers are frightened of criticism, they tend to disclose everything to the prosecution, unless it is highly sensitive (DS/B5). Almost a third of officers interviewed said that the changes had made them more professional or that it was helpful having guidelines about what should be disclosed:

> "[We] seem to be pretty switched on to it now, I mean, data protection, do not destroy, hang on to it." (DC/A9)

> "Everything should be disclosed and if it's not, then there are questions that have got to be answered. We can't fiddle the books any more, which is good, because, you know, there are times when, in the past, no I can't tell you that, I can't possibly comment on that! {laughs}" (CJU/B1)

> "It's heightened people's awareness about the bits of paper they should be looking after and the information they should be aware is disclosable, or shouldn't be disclosed or whether it's sensitive or prejudicial... Every single piece of paper, every computer log, every written word should be accounted for." (PS/A3)

Most police officers claimed that everything was recorded whether through a sense of

honesty, to avoid losing cases on 'technicalities' or because they did not see it as their role to filter information:

> "I've always tried to do a fair and thorough investigation and if I've seen evidence which suggests it's of benefit to the defence, I would always arrange for the defence to have that. I never saw my job as only for the prosecution and everything else was hidden away, so I've always tried to deal fair. So when it came in it was merely saying carrying on doing it the way that I've been doing it." (PC/A7)

> "It's got to [go on the schedules] 'cos if it's not and the defence find out about it they'll kick up a stink – case goes. It could be nothing. It could be like a 208 but the judge, you know will say "Well, if you withhold that from us, what else are they withholding that we don't even know about?" (PS/A4)

Some prosecutors went so far as to say that too much material was on the schedules:

> "They will sometimes fill in items that I can't think of any reason why they would undermine the prosecution case... some of them are also now, putting items in the 6C, the unused schedule, that are evidence in the case, and I didn't notice that problem before and I think it may well be that officers are actually quite frightened of being accused of not disclosing stuff that they have a duty to disclose... they are going over the top and putting all sorts down... Some officers have said to me personally, we're signing our names to say we've done our job diligently and we've put everything down so we are going to put every little thing we can think of, to cover our own backs basically. The way the forms are set out does breed some personal responsibility on the individual officer." (SCP/A2)

> "They'll put down all sorts of rubbish like 'Master Tape Record'. All the master tape record is is a piece of paper which says 'at such and such a time, an interview took place and this is a tape reference' and that'll come on the unused material schedule. Who gives a monkey's about that?" (SCP/A5)

Whilst this is not in accordance with the CPIA, which was intended to limit the amount of unused material that had to be recorded, the MG6C schedule is also intended to be a safeguard against inadvertent non-disclosure. Whilst this might create more work for prosecutors, it does not disadvantage the defence.

It is argued that disclosure is a difficult task for police officers to perform. It requires more than the simple bureaucratic listing of material: the officer is expected to make detailed judgments about the legal significance of evidence collected and the ways in which it might undermine the case against the accused. This is something which, as a police employee, the disclosure officer is ill-equipped to carry out. The police are not legally trained and many Crown Prosecutors complained that the police lacked the legal knowledge to ask suspects relevant questions in interviews (see Chapter 3). If, as agents of the prosecution, they cannot make out the necessary elements to prove an offence, they cannot be expected to consider possible defences and supporting evidence. They may not understand a defence statement that involves complex legal argument. As described above, the extensive training required to enable officers to fulfil this role has been limited. It is unrealistic to expect this new and challenging legal duty to be carried out in a way which is able to transcend the prevailing working ideologies of the police. As one Senior Crown Prosecutor explained to me:

> "What worries me considerably about the practicalities of how they operate is the appointing of a disclosure officer by the police. My understanding of it

> when it originally came in and the training we received with the police, was that the police would train specified disclosure officers who would deal with only disclosure. That's not how it's worked out at all and basically, it's the officer in the case who does the disclosure and they seem to have a very imperfect understanding of what disclosure means. So, you'll standardly get the unused material form MG6E returned saying 'nothing undermining' and if you make some enquiries you'll find that there is perhaps something potentially undermining...I worry that there is stuff not being disclosed that ought to be." (SCP/C8)

The police rarely attend court, other than to give evidence, this means they are unlikely to know how the courts are ruling or how the defence uses material at trial:

> "I don't like it and I don't feel confident with the system at all... not telling us something, that's what concerns me, because they don't understand the significance of things." (PCP/C7)

> "It is totally unreasonable to expect a police officer to look at a case with a defence solicitor's hat on and say 'If I were defending, I would want to make use of this in defending my client' because they are not defence solicitors, they are police officers." (SCP/A5)

Although the police have always had the capability to suppress evidence, there was concern that the new provisions formalise this potential for abuse:

> "I can't see a documents officer coming up with something that really drives a coach and horses through their case, if it's a big case, where hundreds of police hours have been put in, saying 'Look Sir, shall we show the defence this statement?' I can see it going through the shredder." (Sol/A12/ii)

Some officers are reluctant to give the suspect potentially exculpatory evidence:

> "This thing where you've got to give them all your, all the weaknesses in your case. Well, if they can't find them, why should we give them? I mean all they're giving us is 'that's what my defence is going to be'." (PS/A4)

> "The failsafe is, we won't disclose it unless we've got to. My opinion, anyway, if we've got something that we think 'should we disclose it, or shouldn't we disclose it?' I would say we shouldn't and then if the pressure's on then we'll have to disclose it, you know. But it doesn't happen. Very, very rare really." (PS/A3)

The CPSI (2000) found that the listing of unused material was regarded by the police as a mechanical task (para. 4.11) and was particularly poor in summary trials (para. 4.15). Some forces have routinised the procedure by creating pre-printed schedules from which the officer deletes non-applicable items. One quarter of barristers were concerned that the schedules are incomplete:

> "Bitter experience, I'm afraid, has taught all of us that prosecute that those lists are not always complete. You can be told... you've been told of everything that exists but actually when you push it, sometimes, you find that there is other stuff lurking that has just been forgotten, shredded, dumped and that really can happen. SOCO [scene of crime officer] evidence is a key area – fingerprints, negative fingerprints, just left off." (Bar/B1)

Plotnikoff and Woolfson (2001) found that unscheduled unused material was disclosed in 45% of cases. I was told of numerous examples of relevant material that had been omitted from the schedules. This had emerged serendipitously, often during the trial and led to the abandonment of many cases. Material discovered was not of a minor nature and included:

- identification parades that were illegal (SCP/A5) or where the defendant had not been picked out (SCP/A5; EO/A12)
- an interview with the main prosecution witness who had been arrested initially as a suspect (Bar/B5)
- a box of unread material, including original statements (PCP/C9)
- details of someone wearing an identical shirt to the defendant who had been arrested and not charged (Bar/B11)
- the police command and control log, disclosed by prosecuting counsel after the closing speeches, containing an eye-witness report consistent with the defendant's account (Bar/B8)
- A video interview with a child who had been present on one occasion when the defendant had allegedly indecently assaulted his step-daughter. No charge was brought in relation to this incident because this child had made a credible presentation, denying any impropriety (Pupil-Bar/B5)

4.2. Primary Prosecution Disclosure

The only people interviewed who wholeheartedly endorsed the CPIA arrangements were Crown Prosecutors. This was by no means a unanimous opinion and varied considerably between the two CPS branches I studied. In Branch A, 71% were in favour of the changes, 14% opposed and 14% were ambivalent. In Branch C, 50% were in favour, 38% opposed and 12% were ambivalent. Those in favour of the changes thought the provisions were:

> "A tremendous advantage because it stops a lot of 'fishing expeditions' by the defence." (SCP/A3)

> "A good thing." (SCP/A8; SCP/C5)

It was claimed that disclosure had caused problems in the past. It had been:

> "A tremendous problem. It involved days and days of sifting through stuff and looking at it and getting absolutely nowhere. Defence sending a clerk down there just to go through the stuff, being told to look at everything and the police would have to be there and probably we'd have to be there as well. It got nowhere." (BCP/A10)

Those opposed to the provisions spoke equally strongly of:

> "A very dangerous backward step." (PCP/C9)

> "Absolute nightmare, I bitterly regret the day these new disclosure provisions came in." (SCP/A5)

The major reason for endorsing the changes for over a third of all Crown Prosecutors was that the provisions had stopped 'fishing expeditions' (36%):

> "The quandary that we were in not knowing what the defence case was 'Do I, do I not?' Because you take the risk, you disclose something that isn't

> relevant but certain defence solicitors would just leap upon [it] and ask for adjournment after adjournment to see items that weren't relevant but they would just use it as a delaying tactic and delay generally goes against the prosecution rather than the defence." (PCP/A14)

> "Now we are entitled to say 'on your bike, why should we do all' - sometimes you were ending up doing their defence work for them because you were giving them their defence." (EO/A12)

When questioned further, nearly 10% conceded that these were, in effect, hypothetical objections, and that they had no evidence that this had been a problem hitherto:

> "In the vast majority of cases with sustainable defences, there are only a limited number of defences, so in 9/10 cases, you'd worked out what the defence was going to be, not because the defence had told us but because it becomes obvious from the facts. But that 1/10 gave us problems... In the vast majority of cases that in itself was not a problem because there was very little unused material." (PCP/A14)

> "It wasn't so. Particularly as the defence didn't have time to have access to everything anyway and go through everything with a fine toothcomb. It wasn't that we were getting bogged down by demands for disclosure. It wasn't a major problem at all." (SCP/A5)

The duty to make Primary Prosecution Disclosure is triggered once the case is sent to Crown Court. Other than in cases attracting PII, the question of what should be disclosed as Primary Prosecution Disclosure is a decision solely for the prosecution (*B*, 2000).[14] The legislation makes the prosecutor responsible for disclosure when, in reality, "lawyers are only as good as the material given to them" (Pater, 1999:23). Despite the concern expressed by many prosecutors that material was often omitted from the relevant schedules prepared by the disclosure officer, it is rare for prosecutors to examine material that the disclosure officer has not identified as potentially undermining the prosecution case (CPSI, para. 4.102). In most cases prosecutors examine the schedules rather than the documents listed, unless something has alerted them to a potential problem:

> "We don't really have the time. A lot of the time it's a case of looking through the list and having to hope that the content is what we think it is." (SCP/A2)

Many defence solicitors were concerned about this:

> "The CPS act entirely on the case officers' list of material and if, on the face of it, that doesn't appear to contain anything they'll just say 'There's nothing to disclose'." (LE/B1/i)

Prosecutors had mixed views about the adequacy of the schedules. This may reflect their differing levels of vigilance in inspecting the schedules, as those who do not look for missing material tend not to find it. In some cases, their judgement was based on their knowledge and trust in the police, particularly the specialist teams.

> "I tend to trust the police implicitly, particularly over child abuse stuff because they're very highly trained... the practical reality is that I have to trust them,

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[14] The prosecutor may consider making voluntary disclosure after consultation with the police and other interested parties (para. 1.1).

> otherwise we would never get these cases through... You are trying to do a balancing act all the time and it is largely based upon your own views and whether the officers involved are experienced and how far you are prepared to go to trust the police." (PCP/A14)

Others prefer not to create work for themselves, despite the reservations they may have, on the basis that this would make their workloads untenable:

> "Difficult to know if they are detailed enough without actually seeing the material listed in them isn't it? I suppose I just assume they are, I don't delve." (SCP/C2)

> "I am sure that the information that comes to us from the police is half the story, if that, in terms of unused material. But I haven't got time to say to the police 'Hang on! And the rest.'" (SCP/A5)

> "You can't handle volumes of stuff, otherwise we'd have boxes for every case and we don't often get sight of everything, unless it's a serious case and you think 'I've got to see what this is', it is a bit of a wing and a prayer... You are 100% reliant on that disclosure officer's report and there are cases where that isn't necessarily all there is." (SCP/A3)

The "awkward split of responsibilities" (CPSI, 2000, para. 13.2) between the CPS and the police is artificial and unrealistic. The two organisations send schedules and memos back and forth, each relying on the other to take responsibility for disclosure and each being able to blame the other when something goes wrong:

> "I've had responses that are one line standard letter responses many, many, many times now. The CPS are saying that they don't really get involved any more. They're saying the disclosure officer has considered the defence statement and nothing further will be disclosed to the defence so that the CPS will say, it will be 'pass the buck' time, that's what will happen when there's a miscarriage of justice and an enquiry into why it's happened. There will be 'Wasn't my fault'." (Bar/B8)

There has been a history of tension between the police and the CPS. A detective explained that much of this is caused by their differing viewpoints. The desire of the police to secure convictions means that many regard the CPS as too 'soft':

> "We're at the sharp end, knowing the criminals... Personally rather than professionally involved and want to get them prosecuted." (DS/B5)

Some complaints were made that increased formality and the policy of rotating officers out of the specialist squads meant that personal contacts and trust had broken down. Most liaison now takes place through the CJUs:

> "I could rely on them, they were experienced and they were good, but nowadays, I don't know who I'm talking to, there's no relationship with the officers at all really...I knew them all and they knew not to try it on, we didn't write each other memos, we spoke on the phone but then if I asked them to do something, they'd do it. And equally if they asked me to do something I'd do it... We play things very much by the book now." (PCP/C7)

In my own research, about one third of Crown Prosecutors and 25% of solicitors expressed concerns that important material was omitted from the schedules:

> "The difficulty that we sometimes have is that we are reliant on the police really in indicating to us whether there is anything there that undermines the prosecution case. You are 100% reliant on that disclosure officer's report and there are cases where that isn't necessarily all there is...I still don't think all of the time that we know exactly what is going on, certainly from the police. I don't like this relying on the disclosure officer's report." (SCP/A)

Over one-third of prosecutors expressed concerns about their total reliance on the police:

> "I can see one of us in ten years time being in front of the Court of Appeal for something that came to light subsequently [which] we should have spotted and we didn't, and I can see that happening. It's quite difficult for me because we've got to rely on the police but at the same time, we are responsible for the conduct of the prosecution." (BCP/A10)

Some prosecutors make certain basic checks, such as examining custody records and comparing the initial reports in the Command and Control log with the witness statements. If they find discrepancies, they then call for all the material:

> "We've got a case at the moment where they submitted schedules saying there is nothing undermining the case and, because we've had problems in the past, I actually wanted to see what they had and the first statement they took undermined the case, potentially. It was a small point, but what was in there supported to a certain extent what the defendant was saying." (PCP/C9)

> "If I've got a warning sign, I'll yank them in, I won't do it on the phone or memo. 'Get in here, I want to know what the hell's going on here.' Because I don't trust them...I like to write 'Is there anything you're not telling me?'... In the murky waters of informants and things, I think they tell us what they want us to know." (PCP/C7)

Experience and intuition may enable prosecutors to detect omissions, such as the missing informant whose information led to the defendant's house being raided (SCP/A5):

> "You can tell usually from a file if there's going to be something more, like an informant, or that sort of thing, you can usually tell. Or sometimes it will come as a result of you asking further questions about the evidence...for example, fingerprints, they often send off finger prints and don't tell you because they've come back negative." (SCP/C8)

> "You have to have a bit of a Sixth Sense to anticipate what isn't there." (EO/C3)

Clairvoyancy is a dangerous and unsatisfactory basis for a criminal justice system. Crown Prosecutors are not police officers, so cannot be expected to know what material exists. They generally do not have defence or Crown Court experience so cannot be expected to know what might be useful to the defence.

Despite the requirement of the Attorney General's Guidelines (2000, para. 19) that a written record should be made of all decisions, prosecutors do not always sign and date the schedule to show that they have considered its content. They failed to endorse the schedules of non-sensitive material correctly in 37% of cases, "a matter of considerable concern" (CPSI, 2000, para. 4.47). Plotnikoff and Woolfson (2001) found that the majority of files (56%) contained at least one schedule unsigned by a reviewing lawyer, this was higher amongst the sensitive

schedules (75%) than the MG6C (38%). The inadequate recording of what has been disclosed, and when, may cause problems in any appeal.

In bigger or more complex cases, disclosure is an enormous task for prosecutors. One prosecutor (PCP/A14) described a 'supergrass' case involving nine defendants, each facing sixteen charges. All made no comment in interview and no defence disclosure had been made. The unused material schedule was one hundred pages and described five thousand items. Because of the volume of material involved, she spent three days at the police station, inspecting each item to decide whether or not it should be disclosed. 3,500 items were disclosed to the defence. The material had to be inspected at the police station but the defence was given access to a colour photocopier. She was angry at being criticised by the judge over one misjudgement, and conscious that this could have led to the trial being halted.

The problems over CPS staffing and resources have been well documented and several interviewees raised the effects of this on the implementation of the disclosure provisions:

> "It could take days to go through all this stuff and I just haven't got the resources. So, things are going to get lost, things are going to get missed and it's going to lead to miscarriages of justice I fear and oh for the days when the defence could have access to everything and it was up to them." (SCP/A5)

> "[Writing to them] It's like sending it into a black hole. I mean, the state of the CPS in [City B], it's not [their] fault, it's just they haven't got enough staff and they're so demoralised in there, so they're not going to look at the schedules." (Sol/B2/i)

> "There's not enough time to just do the work, let alone getting things which probably are completely irrelevant." (SCP/C2)

As a result of its overwhelming workload and budgetary constraints, the CPS has structured its casework in a manner not dissimilar to that criticised in defence solicitors' firms (see Chapter 3). Solicitors focus on advocacy and preparing cases for hearings at the magistrates' courts, with cases being presented by whoever happens to be in court. Crown Court work, and increasing amounts of pre-committal preparation, is undertaken by non-solicitors; executive officers:[15]

> "We're in court, usually four days a week and then of course we've got all the paperwork to do which gets done by the fact we do extra unpaid overtime and take work home. I mean, I have two trials tomorrow, those have to be taken home tonight... There is a staffing crisis across the CPS... I would love to follow things through to the Crown Court but I haven't got the time so generally, we do the committal and then it's taken out of our hands." (SCP/A8)

It tends to be the executive officers who deal with the defence statements and secondary disclosure:

> "We have this distance relationship with our committal files, as you probably appreciate, that they come through us, to the law clerks... [We only return to the files] if it's referred back to us by the law clerk for questions as to unused

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15 The Glidewell Report (1998:67) expressed concerns about this. In one area, 80% of unused material was dealt with by caseworkers (CPS Management Audit Services, 1998, unpublished, cited in Plotnikoff and Woolfson (2001)). Customs and Excise and the Department of Trade and Industry restrict caseworkers to administrative tasks (Plotnikoff and Woolfson, 2001).

> material or defence statement or question of plea." (SCP/A3)

This division is potentially dangerous, for non-lawyers, as the police, cannot be expected to appreciate fully the potential evidential significance of material. The CPSI condemned the routinisation of disclosure by prosecutors and police to a "mechanical task" (2000, para. 5.63) as illustrated by prosecutors writing to the defence indicating that there was no material to disclose under the primary test, before the MG6E report had been received from the police (para 4.113).

There was great variation in the application of the provisions between CPS offices, and indeed officers:

> "I think that the CPS, they vary [by area], and I find it also varies with the type of case." (Bar/B7)

> "[Town H2] branch has a lot less work than the [City B] branch so we've had more difficulties with them refusing to give us disclosure on things. In [City B], the issue about disclosure in the magistrates' court, effectively doesn't arise because the CPS lawyers are just fire-fighting... The CPS's attitude is different if they are very rushed, whereas if you go to somewhere like [Adjoining Region] or [Neighbouring Town] or somewhere like that I think you'll find a very different atmosphere, whereby they do consider defence statements, they're much more on top of things ... I think that's to do with money and resources and people and whatnot." (Sol/B2/i)

Those interviewed varied between those who would disclose anything, in the interests of either justice or expediency, to those who applied the tests rigorously:

> "As long as we're told, I'll tell the defence, it's no problem, no skin off my nose... If in doubt, send it." (PCP/C7)

> "I think sometimes you're just as well to let them have copies of these things because who wants to go to the Court of Appeal six months later on because you haven't disclosed it?" (EO/A12)

> "I tend to be quite strict about it. It's very tempting to say 'Oh it doesn't matter, they can have such and such, it doesn't make any difference, may as well have it,' but it's the thin end of the wedge and if you start disclosing stuff which you don't have to disclose then they'll start fishing expeditions again and that's back to where we were before the CPIA." (SCP/C8)

Some prosecutors demonstrated very adversarial attitudes and a dislike of having to find material for the defence:

> "Under the old system, we were basically doing the defence solicitors' jobs for them." (PCP/A14)

> "It's probably put the defence in their place a little bit." (PCP/A1)

> "Even some prosecutors I'd have real qualms about having them address a situation [deciding disclosure] – mentioning no names!" (Bar/B15)

Plotnikoff and Woolfson (2001) found that many prosecutors applied the provisions more strictly than the police did. In at least half of the cases they inspected with items listed on the sensitive schedule, some of that material was not disclosed by the CPS. The duties of

prosecutors as set out in the CPIA may conflict with their overriding duty to act fairly. For example, under the Act, there is no duty to disclose material that might support a different defence to the one stated. The BAFS/CBA (1999) survey cited an instance in which the CPS refused to disclose a statement from a witness who said the attacker was acting in self-defence because the defence stated was alibi. The CPSI judged that prosecutors were tending to apply the test under the CPIA too strictly (para. 4.118). 5.2% of cases were the subject of incorrect non-disclosure (para. 4.114-5). Overall:

> "Whilst the quality of decision making is better than some anecdotal evidence might suggest, there is clearly no room for complacency" (CPSI, para. 4.119).

4.3. Defence Disclosure

Defence statements were "a leap in the dark for all concerned" (Sprack, 1998:225). As with much of defence solicitors' work, the issuing of these statements quickly became a matter of routine. Many solicitors asked counsel to draft one, then used that as a template (Bar/B12). Others went far beyond this:

> "I have one on the machine, I run it off and let them fill the blanks in. We're in this business to make money you see and things have to be made nice and simple and as easy as possible I'm afraid to say. Yes it is pro-formas." (Sol/A12/ii)

I was shown a variety of formats[16] but most defence statements tend to be kept as "brief," "woolly" or "vague as possible," in order to allow the defendant scope to adapt the case presented at trial and to avoid the prosecutor using any concessions made as evidence in support of the prosecution case:

> "If you go past three lines, you're really in trouble." (Sol/B10/i))

> "They are exactly what I would do if I was defending. The absolute minimum." (SCP/A11)

Just over half of defence statements either contained a bare denial of guilt or did not meet the requirement of s5 of the CPIA (Plotnikoff and Woolfson, 2001:55). The CPSI considered that 25% of defence statements contained inadequate detail for the prosecutor to make an informed decision (para. 5.19). Some Crown Prosecutors complained that defence statements provided fewer alibi details than the previous alibi notices had done. Some firms just write "defence as per police interview." In a case that I observed at Town A Crown Court, the CPS took great exception to this practice and challenged the adequacy of such a defence statement in response to requests for secondary disclosure. The judge agreed with the CPS that such a statement was inadequate, upbraided defence counsel and ordered a revised statement to be submitted by the end of the day. In *Macaluso and Others* (2001), a submission that the requirement to serve a defence case statement to trigger secondary disclosure breached Article 6 was rejected at a preparatory hearing.

The routinisation of drafting is reflected in the standard response that such statements provoke: executive officers (C3) told me that they just ignore the questions asked, as they are "just a formula." It may be that as secondary disclosure is limited, defence statements are seen as being of little benefit: a self-fulfilling prophecy as prosecutors noted:

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[16] Some defence statements set out the requirements of the Act as titles with the relevant facts filled in underneath, some are in the form of a brief letter, others are more detailed, asking questions about sensitive material and PII applications.

"Some are good, some are bad, some appear to be deliberately evasive. But then, they're not doing themselves any favours because if they don't give us enough information in the defence statement and they want something from us, if it doesn't tell us properly what their defence is, then we can't say 'yes you can have it' because we can't say 'yes it assists them'... If they're not giving us enough information, we're not going to give them what they want back." (EO/A12)

"The smooth operation of the disclosure regime is made significantly more difficult in many cases by the lack of, or inadequate, defence statements." (CPSI, 2000, para. 5.64)

Drafting such statements requires a tactical assessment of whether to make them 'offensive', to trigger disclosure, or 'defensive', to avoid creating a hostage to fortune (Ede, 1997). Few solicitors showed any enthusiasm for deploying the ploys that have been suggested such as including 'health warnings' in the defence statement, reserving the right to amend or add to the statement once further enquiries have been made (Corker, 1997(3):1064):

> "Interestingly, this one starts off 'The following statement is given on the condition that the prosecutor can establish that there is a case to answer before seeking to rely on this defence statement.' I haven't read this before." (BCP/A10)

More than one defence statement may be served, for example if new evidence comes to light, but this is a risky strategy that appears likely to attract adverse inferences.

> "It's not uncommon for the Crown to suddenly serve additional evidence three days before the trial and the statement itself could be dated six months ago. Now as much as we may argue 'Well had that been served at the right time it may have had a significant difference in what was in the case statement,' experience tells me that a Crown Court judge will just say 'So what?'" (LE/B1/i)

Some solicitors thought that counsel should be involved if the statement was being drafted for 'technical' reasons (Sol/B2/i) to obtain specific items. The Bar Council issued a practice statement, advising barristers against involvement with drafting defence statements (24th September 1997). Counsel will typically have had little involvement with the case at this stage and tend to regard such requests as an admission of the solicitor's incompetence (Bar/B1), desire to cover themselves (Bar/B2), laziness (Bar/B3), or unfamiliarity with criminal work (Bar/B8).

> "Hate it, it's not my job... And I don't get paid!" (Bar/B2)

> "They are scared of any comeback on them if things go pear shaped." (Sol/A13/i)

Most solicitors said that they would always submit a defence statement at the Crown Court.[17] I was told of only two examples where this had not been done: one in a case in which the defence were arguing a point of law that, if they lost, would lead to a guilty plea; the other where making any admissions would be so incriminating that the prosecution would succeed even if the injured party did not attend court. One barrister (B13) described advising a client

[17] The CPSI found statements were not submitted in 12.4% of Crown Court cases but most of these were from one site where this was accepted practice.

with severe mental health problems not to submit a statement after the client had given him five differing versions of events, the last one being "I killed him." Such a defendant now will be doubly prejudiced, firstly by denial to basic materials for building a defence and secondly because this failure may lead to adverse inferences being drawn (Leng, 1997:218).

Defence statements are seldom served in the magistrates' court unless there is a specific item that the defence wants to obtain (11/251 in the CPSI survey). The CPSI condemned defence solicitors' reluctance to take advantage of the secondary disclosure provisions in the magistrates' courts (para. 5.12).

> "It's not a common thing for defence solicitors to do this because I think there is the perception that in the magistrates' court, trials are a waste of time, it's only for the Crown Court." (Sol/B2/i)

> "Very rarely get them [defence statements] in the magistrates' court. When you do in the magistrates' court, they tend to be useful because they are thought about and they are served for a purpose." (SCP/C8)

One solicitor said that he submits defence statements in every summary trial, in order to cause confusion and has had a case discontinued as an abuse of process as a result:

> "I suspect I'll do them more because CPS just can't cope and the more chaos you can cause and engender, the better it is for the client." (Sol/B10/i)

It can be difficult drafting a defence statement where there are multiple counts on the indictment:

> "I've got one [burglary] at the moment where it's 13 million:1 that he's committed it on the DNA; 13 million:1 on the next one on DNA; on the third one, the sample's not come out and it's 90,000: 1. Well 90,000:1 is not particularly brilliant, so do we write a defence statement saying 'yes we nicked two out of three' or do we write a defence statement saying 'we deny them all'? Very difficult." (Sol/B10/i)

The CPIA does not consider the fundamental problem that defence solicitors face in executing their duties under the Act. Unlike the prosecution and the police, they are reliant upon the co-operation of the defendant. The Act is predicated upon both sides wanting the regime to work smoothly. This is not the function of the defence in an adversarial system and it is rarely a priority for the defendant. If the defendant fails to make or keep appointments, a perennial problem, the solicitor has to choose between submitting a statement without the authority of the client, or the risk of penalties being imposed at trial. Defence statements can constitute waiver of privilege. At common law, admissions made by a solicitor on the authority of the defendant are admissible against the defendant, (*Turner*, 1975). Few solicitors asked their clients to sign the defence statements when I interviewed them. The Act does not require defendants to sign the statement but solicitors have been advised to request this for their own protection (Corker, 1997(3):1064), a further example of solicitors acting in their own rather than the client's interests. The Court of Appeal has recommended this (*Wheeler*, 2000). Making defendants sign the statement is of no benefit to them and may hamper the testing of the prosecution case if elements of the statement are partially inculpatory. In some instances when the prosecution case has been weaker than anticipated at court, defendants have repudiated their defence statements at court and sacked their representatives (Pleasence and Quirk, 2002). They could not have done so if the statement had been signed.

The courts varied as to how amenable they were to granting extensions to the fourteen-day time limit but there is little that they can do by way of sanction if the statement is submitted

late. Some solicitors applied routinely for extensions, others made a point of always submitting their statements in time:

> "If you ask, they'll seldom give an extension, but if you serve it late there's not really much that can be done." (Bar/B7)

> "You can't enforce it. No judge is going to turn around and say 'I will not allow you to run this defence if you haven't served a defence statement within fourteen days'. All he can do is threaten the defence with wasted costs orders and the like." (SCP/A5)

I did not question my respondents as to how work is distributed in their firms, but as many firms delegate their Crown Court work to para-legal staff (McConville *et al.*, 1994), solicitors may know little about how disclosure is working in practice. Whilst many cases require only a rudimentary defence statement and no secondary disclosure, such important work should not be delegated to an unqualified member of staff. There is no 'failsafe' mechanism with disclosure. If material is unlisted or withheld, nothing happens to draw attention to this deficiency; the process of delegation can thus continue, apparently working successfully. It is insufficient to assume that counsel will take responsibility for disclosure. Many barristers only receive the brief on the morning of trial, others consider that it is for solicitors to check the schedules.

If the provisions are to be implemented as intended, this requires defence firms to be organised differently. Delays may occur where the firm has a separate Crown Court department from the section that receives primary prosecution disclosure at committal (LE/B1/ii). Work now has to be undertaken much earlier in the process:

> "Instead of backloading a case, whereby all the preparation is done right at the end of the day, which was endemic, it now means that those good firms are having to do the work as soon as they are getting charged, advising them appropriately because of plea before venue and the relevance of credit on a guilty plea and things like that, therefore doing more work." (Sol/B2/i)

Some thought that this would cut the number of 'cracked' trials:[18]

> "We always suspected certain defence firms hadn't taken instructions off their client or were basically just delaying or even fiddling legal aid for what it's worth and they were getting clients to enter not guilty pleas on spurious grounds just to delay. It then gets to the mode of trial and they plead guilty and if they have to give a defence statement now that's a bit harder because they've actually got to come up with what the defence is in advance which means they've got to apply a little more thought to it, they've got to take proper instructions and it's harder just to delay... It's not a rampant problem, but it was noticeable with one or two firms, the number of trials that collapsed on the day started to drop off a little bit." (PCP/A14)

The poor performance of defence lawyers, discussed in Chapter 3, was criticised in relation to disclosure:

> "Their knowledge of the law of disclosure is appalling. We get away with blue murder because they don't know the law and they don't keep up to date with it. Haven't got a clue most of them." (PCP/C7)[19]

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18 Where defendants change their plea to guilty at the start of or during the trial.

19 This demonstrates further the adversarial attitude of some Crown Prosecutors.

None of the defence solicitors or legal executives whom I interviewed was in favour of the provisions, although 8% of solicitors thought that some form of defence disclosure was a good idea and 8% said that the disclosure provisions had been abused by (other) defence solicitors prior to the CPIA. 29% were ambivalent or unconcerned about the changes:

> "Marvellous for the text books but I'm not at all sure what it does in practice." (Sol/E3/ii)

> "[They] do not diminish the defence case." (Sol/E3/iii)

> "No big deal." (Sol/D12/i)

One thought the CPIA had made little difference following the changes to the right of silence (Sol/A12/iii), another that they did not "tip the scales" as the prosecution should have known what the defence was anyway (Sol/A15/i). The legislation places a great responsibility on the defence to be alert and proactive in seeking out potentially useful material. Such indifference, although in accordance with what is known about defence solicitors' lack of adversarialism and routinisation of work (see Chapter 3), does not bode well for their approaching the unused material schedules with the necessary scepticism and spirit of enquiry.

Almost a quarter of legal representatives thought that the CPIA was:

> "A major problem." (LE/B1/i)

> "Disclosure of material is now back in the hands of the police, where we didn't want it." (Sol/B2/i)

Only 15% expressed their fears of miscarriages of justice occurring as a result of the legislation, but those who did were emphatic in their opposition:

> "The most diabolical piece of legislation they've come up with by a long chalk. We're back to being entirely reliant on police officers disclosing things... CPS have completely abrogated their responsibility to act fairly and I think there will be substantial miscarriages of justice as a result." (Sol/B10/i)

> "We don't get unused material any more – we used to win cases on the unused material." (Sol/E3/i)

Several interviewees pointed out the limits as to how useful a defence statement can be, particularly if the suspect has answered questions in interview. Most respondents thought that defence statements had not made a significant difference:

> "The defence statements on the whole are regarded more as an administrative job rather than of real assistance." (Bar/A1)

> "I don't think CPS even look at them and the judges on plea and directions, some of them, no names mentioned, say 'Have we got a defence statement, list of witnesses, yeah, yeah. Right Mr Bloggs, what are the issues in this case?' It's just paper that's there." (Sol/A8/i)

> "It would have to be startling for it to be of any use... They have just complicated things and certainly haven't helped to speed up case preparation and I don't think they help the prosecution very much to find out things they didn't already know... In run of the mill cases, I really don't think it helps at

all." (Judge/B2)

4.4. Secondary Prosecution Disclosure

Secondary Prosecution Disclosure effectively broke down due to the alien expectations of the regime. The police regard their involvement as concluded once they have forwarded the file to the CPS, the defence are cautious about committing too much in their statement and prosecutors say defence statements are too vague to trigger disclosure (a "chicken and egg" situation, CPSI, 2000, para. 5.55). Judges are not enforcing the provisions and barristers make informal disclosure in the interests of justice and efficiency.

> "I have yet to see any secondary disclosure appear in any case whatsoever, in any way, shape or form, it just doesn't exist. I've not even ever yet seen a letter saying there is no further disclosure." (LE/B1/i)

> "Secondary disclosure… a pro-forma letter to the police to say 'we've had the defence statement, is there any other material now which is appropriate for secondary disclosure' and we're just not getting a response from them. I don't think they realise that there is another stage. I think the officers just seem to think we fill in the form with what we disclose at primary disclosure and that's the end of the story. I don't think they realise that disclosure is now an ongoing thing." (SCP/A2)

It has been suggested that the prosecutor may give the disclosure officer written advice as to what sort of material to look for, particularly in relation to legal issues raised by the defence (JOPI, para.3.36-7). The Inspectorate found that, in practice, secondary disclosure was delegated routinely to caseworkers, with prosecutors giving advice only infrequently:

> "In an ideal world, the lawyers would see them all, we'd make a decision on the unused material as to what can go for secondary disclosure. If we weren't happy because we didn't know the content of the material, we'd request it from the police, or get them to review it, get the disclosure officer to make a decision. But this isn't an ideal world, that's an onerous task and lawyers are in court day in, day out as advocates and we aren't in the office and we haven't got time. That's why I think a lot of the Crown Court staff have decided to just send a pro-forma letter to the police after secondary disclosure and ask if there is anything else that might assist the defence." (SCP/A2)

The Inspectorate found that in 95% of cases, the defence statement was provided to the police (para. 5.26). This was not the case with the police officers I interviewed, none of whom had seen one. This makes their lack of response to requests for secondary disclosure from the CPS unsurprising:

> "When I get a defence statement, I write to the police and I send them a copy saying 'Dear Mr Disclosure Officer, please consider the unused material again in the light of this defence statement and tell me if there is anything which falls under secondary disclosure.' What then happens is that the disclosure officer looks blankly at my letter and thinks 'What the hell is secondary disclosure?' and sends me all the unused material and says 'There you are, you sort it out' because he doesn't know what the hell he's doing… that's what happened initially. It's not actually been happening for a while but whether that now means the disclosure officers are now doing their jobs properly, I very much doubt. Perhaps it just means my admin. staff aren't

> bothering me with it." (SCP/A5)

The uniform and CID officers I interviewed said that, once they had completed the schedules, they forwarded the files to the CJU and thought that if they had prepared the file thoroughly, they would revisit it only if the CPS asked them to look for something specific. If further enquiries are carried out in response to the defence statement, the disclosure officer should notify the prosecutor of the findings on form MG20 together with any re-drafted schedules, if appropriate. The CPSI found that the MG6E (the confidential Disclosure Officer's report) was completed incorrectly in 46/164 cases at the secondary stage. Even if the case does go back to the police, the officer in the case may not be involved:

> "Once the papers go... upstairs you wouldn't hear of it again because everything else is done by them and by the case builders and by the DCI." (PS/A4)

The CPSI (2000) found defence applications to the court for disclosure were made in only 9/344 cases. It was suggested that informal disclosure, often with the encouragement of the judge, was more frequent (para. 5.82). The two most commonly requested classes of document requested by the defence are crime reports and message logs (para. 4.56). It recommended that the test for secondary disclosure should be applied "fairly and generously" following a "reasonable" defence statement (para. 4.75).

The JOPI definitions underline the confusion that the arbitrary nature of the dual tests engender. It describes material for primary disclosure as "anything that goes toward an essential element of the offence charged and that points away from the defendant having committed the offence with the requisite intent" (para 3.18). Lack of intent could just as easily, perhaps more fittingly, be defined as secondary disclosure. In contrast to the Act, it says that "material which slightly weakens a peripheral aspect of the prosecution case, or that may be relevant but has no real effect of the strength of the case against the accused need not be disclosed at primary stage" (para. 3.21). Examples of appropriate secondary disclosure suggested by the JOPI is material that might "assist the defence to cross-examine prosecution witnesses, as to credit and/or substance." Again, this would seem more appropriate as the primary test. This distinction may encourage delay in disclosing material that may cause problems for the defence:

> "It's caused problems for one or two of my colleagues, where secondary disclosure sheds new light on the matter, and it's a bit late in the day if they start giving you new witnesses that you've got to chase up for a trial which is in about two or three weeks, it's a nightmare... [in a recent s18 assault case] Complainant and his friend accused my chap of hitting him with a bottle, independent witness comes out, the bouncer of the nightclub... the day before the plea and directions hearing, served with a statement. If it had been a couple of days later, he might have pleaded guilty, it would have been too late to change his story." (Sol/D13/ii)

The CPSI found that prosecutors tended to apply the provisions restrictively and that little unused material is disclosed but conversely that a "considerable amount" of material that does not fulfil either test is disclosed (para. 9.1). It found that the test for secondary disclosure was applied too restrictively, it was made in just 6.7% of cases in which defence statements were submitted (para. 5.64). There are indications that the provisions are being interpreted ever more strictly:

> "Over the last eighteen months or so people have been a bit more close with their secrets that they have found out and certain CPS areas are insisting on disclosing exactly what the laws require of them and no more." (Bar/B4)

> "[Judges] seem to be clamping down on that now and saying 'If you want something you must justify it in your defence statement.'" (Bar/B7)

Much depends on the temperament of the individual prosecutor and their workload:

> "If in doubt, disclose. I don't want anyone on a 50:50 saying 'don't disclose.' As a prosecution, you've got to be seen to be fair." (BCP/A6)

> "If it's something that's not sensitive it's less hassle to let them have it. Because they just keep on if not, and they think you're hiding something if you don't." (EO/C3)

> "We've not disclosed things whereby there would have been no harm in disclosing it, but you can't afford to set a precedent." (PCP/A1)

Some saw the provisions as a useful restraint upon the defence and would apply the provisions accordingly. One executive officer insisted that material had to be relevant before she would disclose it. She described a public order incident in which the police "were a bit quicker with the CS gas than they should have been." The defence statement was "He didn't use unlawful violence" and a request was made for the police protocols for using CS spray. She would not send these, despite having received them from the police, as they were not relevant to the "sketchy" defence statement that had been submitted (EO/A4).

The Inspectorate expressed concern as to whether prosecuting counsel could properly discharge the duty of continuing review (para. 7.7). Prosecutors are not always informed of unused material that comes into existence after the initial primary disclosure stage (CPSI, 2000). It may be possible that no member of the prosecution team in court has personal knowledge of the contents of all the unused material (para. 7.6). Counsel may not have looked at the unused material and the CPS worker and the disclosure officer might not be there to advise. Organisational stringencies have meant that executive officers now have to cover two or three courts simultaneously (EO/A4):

> "It's the same person who receives all the evidence and continues to review all the evidence but it's not the same person who necessarily goes into court to present the case." (SCP/A7)

4.5. The Role of Independent Counsel

Robertson (1999:xiv) describes the robing room as "a place as important as the jury room and police canteen in the hidden culture of the English adversary system." The Bar Council has made trenchant criticism of the provisions.[20] All but one of the barristers I interviewed had opposed the changes made to disclosure:

> "Appalled." (Bar/B6)

> "A hopelessly retrograde step." (Bar/B9)

> "If there's one area, one area above all others that has led to miscarriages of justice, it's cock-ups over disclosure, stuff not being disclosed." (Bar/B1)

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[20]One did not state his views at the time of the changes. Queens Counsel were slightly less negative about disclosure than juniors (BAFS/CBA, 1999:10). This might indicate that the police and prosecution are able to address their duties more assiduously in the most serious cases.

> "Absolute and utter disgrace from a government of any hue... It's Treasury driven, like everything else. It's nothing to do with justice at all." (Bar/B2)

In all but the most serious matters, counsel become involved very late in the progress of cases. Several of the barristers I interviewed impressed upon me the importance of the independent bar as a constitutional longstop in the workings of the disclosure provisions:

> "You are not there instructed to win, you are there to be an instrument of justice." (Bar/B5)

> "The Bar is an independent referral body, independent of the CPS or anybody else. This is not just us doing a party political... most of us prosecute and defend... If you get a whiff that there's something slightly funny going on, you can investigate and these things come tumbling out... We sometimes, end up being in conflict with the civil service lawyer who is told 'you must apply the rules.' For example, if you go round copying lots of stuff for the defence it's expensive, it's a nuisance and that is how it's looked at." (Bar/ B3)

> "The Bar whatever we, fat cat crap, we are independent, self-employed. I get work or not, depending on my ability, from both sides. My career structure, my career advancement doesn't depend on me getting so many convictions, or proving that I've had so many cases through my hands as a CPS lawyer. I'm not saying they would be dishonest or get close to dishonesty, but the temptation, or indeed the pressure of work, is such that they may overlook some disclosing law." (Bar/B2)

Barristers felt that they were more alert to the risks of miscarriages of justice (Bar/B1), had a sharper sense of ethics than solicitors (Bar/B6) and would often disclose material at court to their opposite number that the prosecution had tried to withhold. This was seen as undermining by the CPS and the police (Williams, 2001). Some thought that barristers did so from self-interest as "it's about self-preservation" (DO/B2). The use of solicitor-advocates was criticised as diluting the benefits of the professional ethos of the Bar (Bar/B1; B3). Counsel have tempered the operation of the CPIA regime by extensive, informal disclosure:

> "One view of this is that the system is adjusting itself in the best traditions of the common law. On the other hand, it may be regarded as unsatisfactory for there to be such significant departure from the statutory regime within a relatively short time of its inception." (CPSI, 2000, para. 1.14).

> "They [CPS] can be as strict as they like. I get bowled in, I give them everything. I don't see the problem; there's more paper for them to read." (Bar/B2)

> "I'll always act on the side of caution and to a certain extent, disregard the CPIA guidelines or rules and regulations for that purpose. I think a lot of barristers do that." (Bar/B1)

The professional code of counsel has proved a useful safeguard, but this is more by luck than design. Its effectiveness depends on the amount of time the barrister has to consider the brief before trial. Several complained that they are no longer paid for reading unused material. Almost three-quarters of prosecuting counsel said they do not usually receive unused material with the brief (Plotnikoff and Woolfson, 2001:56). The Inspectorate found that prosecuting counsel are rarely requested formally to advise on the unused material (22/380) and their instructions regarding decisions about disclosure of unused material were inadequate in about

one-third of relevant cases (para. 4.159). Briefs are frequently received on the morning of the hearing, which gives counsel less time to spot deficiencies in disclosure. Informal disclosure between counsel saves argument, time and money. Its condemnation in the *Attorney General's Guidelines* (para. 26) suggests that it is being opposed for reasons other than these aims of the Act, such as requiring the cooperation of defendants.

4.6. The CPIA and the Right to a Fair Trial

The adaptations made to accommodate the complexities and resource demands of the CPIA have meant that, despite the predictions made and tactics suggested when the Act was passed, the legislation has been little tested in the courts.

The judges I interviewed expressed differing views about the CPIA. One, from a civil background, thought that similar discovery provisions should apply in criminal trials (Judge/B1), the other was more anxious:

> "I agree with the principle that it had gone too far with the defence wanting to see every single document, boxfuls of this irrelevant material but I'm very unhappy about where the burden lies." (Judge/B2)

The 'legalistic' nature of the provisions and their limited application in the magistrates' courts may inhibit defence solicitors from using the provisions in summary cases. One solicitor described the dilemma of whether or not to seek an adjournment if material is disclosed late as this antagonises the bench, particularly if it subsequently proves irrelevant:

> "If we knew there was any mileage in it we'd apply for wasted costs awards against the CPS every day of the week, in every deferred case but lay benches would never grant it. Stipendiaries would." (Sol/B11/i)

Inferences are rarely drawn from inadequate statements (*Neal*, 2000).[21] Difficulties can occur where the defence is a tactical one, such as waiting to see whether witnesses attend court:

> "The defence statement can force your arm there and, okay, it's technicalities, probably oughtn't to be relied on, but none the less, it forces your arm. I suppose in administering justice it's a good thing, but from a defence point of view it limits you." (Bar/B15)

Whilst defence statements impinge upon the privilege against self-incrimination, this has had less practical effect than the CJPOA provisions. The Court of Appeal recognised that the Act should be strictly construed as the provisions "diminish the accused's right to silence and his privilege against self-incrimination" (*Tibbs*, 2000). The Crown is not obliged to seek leave to cross-examine on the defence statement (*Neal,* 2000). There are no provisions to prevent comment when it would be unfair, such as when a defendant gives an inconsistent story due to a lack of recollection, mental illness or duress. Even if comment is not permitted in the closing speech, (s11(3) safeguards the interests of the accused; *Tibbs,* 2000), the damage to the defence case may be irreparable by this point. The jury may be invited to draw multiple inferences under s34 CJPOA and from changes in the defence statement (*Tibbs,* 2000).

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[21] Neal had denied a charge of possession with intent to supply, saying that "the amount of drugs and the associated paraphernalia does not support the allegation." At trial, he advanced a positive case in relation to why he had scales, lists of names with figures alongside and large amounts of money. The trial judge ruled that these discrepancies should be put to him in cross-examination, then the prosecution could comment in the closing speech.

The development of the common law has continued. Although the CPIA replaced most of the common law provisions, it does not address the pre-committal stage. A responsible prosecutor should be alive to the need for advance disclosure that should be made at this stage in the interests of justice and fairness (*DPP, ex parte Lee*, 1999).[22] Disclosure should be made in order that defendants can make a plea based on informed choice (Magistrates' Court (Advance Information) Rules 1985 r4(1)-(3); *Calderdale Magistrates' Court, ex parte Donahue and Cutler,* 2001).

In theory the CPIA could be vulnerable to challenge under Article 6 as "it is a requirement of fairness under Article 6 that the prosecuting authorities disclose to the defence all material for or against the accused" (*Edwards* v *UK,* 1992; *Rowe and Davis* v *UK* 2000). The ECtHR jurisprudence is "not fully developed" on the issue of disclosure (Ashworth 2001:472) and has been considered mostly in relation to material withheld under the principles of PII. The principle of 'equality of arms' is not absolute (*Rowe and Davis* v *UK*, 2001). Both English common law and human rights jurisprudence recognises that restrictions must be placed on a defendant's right to disclosure in the public interest, such as in the protection of national security, vulnerable witnesses or sources of information. It is not clear that administrative convenience can justify such restrictions. The prosecution's duty of disclosure under the ECHR is not contingent upon defence disclosure (*Jespers* v *Belgium,* 1981). The CPIA provisions have been little tested in the courts, if something significant is found, it will usually be disclosed, avoiding the need for any argument. The danger, of course, is when the defence do not know that material exists upon which to found a challenge.

4.7. Conclusion

The provisions of the CPIA were an ill-considered and unnecessarily complex attempt to address a problem that, in most cases, was minor or non-existent:

> "The vast majority of cases are the simple cases... So all the laws are made up for all the complicated cases and all the simple stuff has to follow on." (PC/A7)

> "The system isn't clear and I don't think a lot of people understand it. It's far too bloody complicated... it's mind boggling isn't it? The mental gymnastics in it. I have to get the thing out and look it up every time." (PCP/C7)

Claims that the CPIA provisions would save money were unquantified and appear to have been overly optimistic. This underlines the extent to which the debate proceeded on the basis of rhetoric rather than rational analysis. Plotnikoff and Woolfson (2001) were unable to identify or quantify significant costs or savings to the courts as a result of the CPIA. Contrary to the political claims, the explanatory and financial memorandum published with the Bill prior to the introduction of the CPIA, suggested only that the CPIA would be cost-neutral; CPS costs of up to £7 million per annum would be offset by savings in police costs of £6.7 million. The CPS estimate current compliance with the disclosure provisions has increased their costs by £6 million. The additional improvements recommended by the CPSI would cost an additional £3.63 million and examination of all unused material by CPS lawyers would require an additional £30 million per annum. More than three-quarters of police forces thought that their costs had been increased by the CPIA (Plotnikoff and Woolfson, 2001). The average

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[22] Examples suggested were (a) prior convictions of the complainant or deceased which might assist the defendant in a bail application (b) material which might assist in applying for a stay of proceedings as an abuse of process (c) material which might support a submission that the defendant be committed on a lesser charge or not at all and (d) material which would allow preparation for trial in a significantly more effective manner.

length of Crown Court trials has not changed since the CPIA was introduced.

The CPIA has created divisions of responsibility that have caused confusion and accountability vacuums. In a highly critical report, the CPSI said that:

> "Responsibilities are placed on individuals who are ill-equipped to discharge them... The CPIA is not at present working as Parliament intended; nor does its present operation command the confidence of criminal practitioners. We find that in a significant proportion of contested cases, CPS compliance with CPIA procedures is defective in one or more respects, there is also uncertainty on the part of prosecutors about what is expected of them and in some instances an unrealistic approach to the provision of primary and secondary disclosure." (para. 1.5-1.6)

Paradoxically the more "inquisitorial" regime instituted by the Act has exacerbated adversarial tensions and bred mistrust where often none existed before. A barrister in the BAFS/CBA (1999:56) survey complained that "Prosecution/defence relations have become strained and polarised to the point of not working." Plotnikoff and Woolfson, (2001) found a lack of trust between all participants and fundamental differences of approach to the underpinning principles of the CPIA that better performance alone cannot address.

> "I just wish that the powers that be, who sit in their white, ivory towers would realise, particularly with the court system, with court clerks, defence and prosecution, it's all based upon co-operation between the three sides and that co-operation is being so much eroded away." (Sol/A13/i)

> "Our present culture is 'I have to protect my own back'. I have to tread the fine line between protecting my own back, because magistrates will more readily make a wasted costs order against defence practitioners than they will against prosecution... and protecting my client's interests because I'm obviously an officer of the Court, but I represent my client." (Sol/B11/i)

Epp suggests that the problems with the disclosure regime could be overcome by the holding of 'filter hearings' at which officers from an 'Investigation Review Department' would give evidence to demonstrate compliance with the CPIA Code. He suggests that better management and scrutiny of police practices and emphasising to officers that "compliance with the code is an appropriate goal, irrespective of conviction... might be able to have a significant impact on police investigative malpractice" (2001:198). Such an argument ignores the experience of PACE (discussed in Chapter 3). Procedural controls can have an impact on officers' behaviour and influence the culture but they are as likely to be incorporated in such a way as to minimise their influence. Tinkering with tick boxes fails to address the fundamental flaw inherent in the system, namely that analysis of material with which to compile a defence and to test the prosecution case is the job of a defence solicitor. The Attorney General (1999) thought the problems with the system were caused mostly by participants' "lack of enthusiasm" to implement the Act effectively. In an adversarial system, the defence will never, and should never, be enthusiastic about it. The police and prosecution are unlikely to summon much enthusiasm for a task that requires so much work for limited effect. Encouraging them to do so, runs counter to the lessons that had appeared to be drawn from the miscarriages of justice that led to the RCCJ (1993).

The provisions are strangled by their own bureaucracy, the lack of confidence participants have in them and their fundamental misunderstanding of how cases progress through the system. Delegation of the work by the CPS and defence solicitors to unqualified staff means that it is unremarkable for a case to reach the Crown Court, with the disclosure provisions ostensibly fulfilled, without anybody legally qualified having had any involvement in the

process. This is unacceptable given the acuity required of both defence representatives and Crown Prosecutors to ascertain where missing material may exist and to elicit it. There is a tension between the police and the CPS that the Act is clearly anxious not to exacerbate by any suggestion of a hierarchy. Its allocation of responsibility ignores the generally linear progression of cases through the system. In a thorough investigation, a police officer needs to examine the material gathered and to record it to ensure that, if it is relevant, it is used and/or disclosed. If it is not, then this should be noted to prevent the wasteful duplication of effort, to close off fruitless avenues of enquiry, or in case the material becomes relevant later. The police investigate, therefore they should be responsible for ensuring that all material gathered is listed on the schedules. If the police were given the purely administrative responsibility of listing all the material, then the task could be delegated safely to civilian staff with a corresponding saving in police time and money. Once this has been done, control of the file, the schedules and material should be passed to the prosecutor. If further material is generated, the disclosure officer should pass this to the prosecutor. This would be more consistent with the roles as they are currently fulfilled.

The CPIA regime is a corrupted version of an inquisitorial procedure, wholly unsuited for an adversarial system. The real menace of the disclosure provisions lies where the prosecution either does not know that material exists or does not appreciate the significance of it; or where the defence does not know that evidence exists that may assist them. No system can thwart determined malfeasance, but one that minimises the risk of errors occurring, deliberately or otherwise, requires the logical delineation of responsibilities, fully trained officers who understand their duties and a system of robust checks to detect and deter mistakes. The CPIA fails on each count. Nor are the provisions effective in ensuring the acquittal of the innocent and conviction of the guilty. The vast majority of practitioners is dissatisfied with the operation of the Act (88% of barristers, 87% of defence solicitors, 61% of judges and 44% of justices' clerks, Plotnikoff and Woolfson, 2001)

Whilst barristers are anxious about the provisions and the potential for injustices that they have seen, solicitors are more sanguine. The design of the provisions means that they can afford to be, as they are unlikely to be troubled by hidden unused material unless they seek it out actively.

> "The real fear about disclosure is that something's going on that you knew nothing about and never will know – that's the real problem rather than the mechanics of actual disclosure." (Bar/B14)

> "My view is that there will be miscarriages of justice because of the new disclosure rules. I'm convinced of that." (Bar/B8)

Active Defence, (Ede and Shepherd, 1998), the Law Society's manual, warns defence solicitors when scrutinising the schedules, to look for the "dogs that did not bark," such as missing witnesses or unrecorded police decisions. The CPIA makes this a more onerous undertaking. Searching for negative, hypothetical information is a nebulous task and the greatest danger of the CPIA is that no dogs bark if something is missed.

Chapter 5: The Exercise and Extending Influence of the Silence Provisions at Trial.

The 'silence' provisions of the CJPOA rapidly generated a body of domestic case law. The provisions were used enthusiastically from the start and, as in Northern Ireland,[1] the parameters of permissible inferences have widened and the grounds upon which mis-directions will result in convictions being quashed have been narrowed. Whilst the provisions appear to have been evidentially decisive in only a limited number of cases, they have had much wider symbolic and practical ramifications, in particular upon the investigation process. The arguments of principle that were made against the provisions, set out in Chapter 1, have of themselves, proved insufficient to resist the changes. It is still, however, instructive to consider the effects of the CJPOA against these claims. It is argued in this Chapter that the CJPOA provisions sit uneasily with the presumption of innocence, in some cases making it easier for the Crown to discharge the burden of proof. The CJPOA hinders the adversarial preparation of the defence and is part of the armoury of increasingly inquisitorial powers given to the police, evidence from which may then be deployed in an adversarial context (Cape, 2003:369). This chapter develops the argument initiated in Chapter 3, that the interpretation by the courts of the CJPOA provisions has undermined the protective benefits of legal advice and has compromised the solicitor/client relationship (Cape, 1997; Leng, 2001).

The European jurisprudence concerning the privilege against self-incrimination is "somewhat inconsistent and problematic" (Dennis, 2002:27).[2] The European Court of Human Rights (ECtHR) had emphasised that the privilege against self-incrimination, and the closely allied principle of the presumption of innocence, reflect the expectation that the State bears the general burden of establishing the guilt of an accused (*Saunders* v *UK*, 1997). Contrary to the expectations of many commentators, however, the ECtHR declared that the drawing of inferences from the failure of suspects to answer police questions or from their refusal to testify, does not breach Article 6 *per se* (*Murray* v *UK*, 1996; *Condron* v *UK*, 2001). No explanation was given as to why it should be "obvious" that:

> "...These immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution." (*Murray* v *UK*, 1996 at p60)

The distinguishing feature appears to be the degree of compulsion to which suspects are exposed, which must not be sufficient to destroy the essence of the right (*Funke* v *France*,

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[1] In Northern Ireland, initial judicial interpretation was cautious and lacked coherency (Jackson, 1991). Kelly LJ held initially that failure to testify might justify a finding of guilt only where the prosecution case just rests on the brink of the necessary standard of proof; otherwise, it may merely heighten suspicion (*Smith*, 1989). The Crown became increasing likely to invite inferences and judges became readier to draw inferences in wider circumstances (Jackson *et al.*, 2000) to the point where "in some cases silence is almost taken as presumptive of guilt" (JUSTICE, 1994:5). By 1990, (*McLernon)* Kelly LJ said that the Article was to be interpreted in the widest possible terms, with no limitations on when it may be invoked or on the consequences of this. A refusal to give evidence may, of itself, increase the weight of a *prima facie* case to proof beyond reasonable doubt. By 1991 (*Martin*), inferences could be drawn even where there was a plausible explanation, consistent with innocence, for the conduct of the accused.

[2] In the judgment of *Funke* v *France* (1993) "The Court expresses itself in terms which might be thought Delphic" (Leigh, 1997:660).

1993). The CJPOA/Northern Ireland provisions place the suspect under only "indirect compulsion" (*Murray* v *UK*, 1996 at p65) and are not, therefore, considered unfair.[3] The ECtHR has had a restrictive effect on the development of the provisions (Dennis, 2002).[4] As with the 'Instrumental' endorsement of the right of silence given by the RCCJ,[5] the "common sense" judgments of the ECtHR in determining the fairness of proceedings fails to explore how suspects experience, and criminal justice practitioners implement these provisions. This equivocation has facilitated further encroachment upon the right of silence by the domestic courts (such as *Howell,* 2002).

Commentary about the case law and the effects of the Act upon trials has questioned its evidential value and criticised its complexity. It is one of the few types of evidence to require specific judicial directions (Birch, 1999; Leng, 2001; Dennis, 2002). The Judicial Studies Board (JSB) has issued increasingly lengthy specimen directions for judges to give to juries.[6] The weaknesses of 'common sense' reasoning in this area make strong judicial guidance more important (Easton, 1998:114). The case law reflects only the minority of cases that are contested and appealed, but these judgments influence practitioners' conduct and decision-making, as is illustrated by the responses from my interviewees (described here and in Chapter 3). Court of Appeal judgments are instructive "not only as to correct practice but also the extent to which a breach of such practice will sustain an appeal" (Sharpe, 1998:564). A "disturbing trend" (Jennings and Emanuel, 2001:8) may be discerned in which substantial and significant misdirections have been held not to have made the trial unfair or unsafe (*Francom,* 2000; *Everson*, 2001; *Chenia*, 2002). The CJPOA has created a "normative expectation" (Leng, 2001a:246) that the accused will cooperate in the investigation and trial process. Section 34 inferences are no longer restricted to subsequent fabrication but can now be used, in effect if not explicitly, for punitive as well as 'evidential' purposes to sanction recalcitrant defendants for not co-operating with the police at the earliest opportunity.[7] This has effectively made the police interview a part of the trial but without the benefit of the safeguards or the rules of natural justice that attend a fair trial (Jackson, 2001:147; Leng, 2001). This increasingly disciplinary approach reached its apogee in *Howell* (2002).

The implementation and effects of Section 35 are discussed first, as the directions for the drawing of inferences set out in *Cowan* (1995) were then adopted for s34 (*Condron,* 1997).

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[3] The application of criminal sanctions for failure to answer questions breaches suspects' right to a fair trial (*Heaney and McGuiness* v *Ireland*, 2001). A statutory requirement to answer questions does not, of itself, contravene Article 6; the use of such responses in criminal proceedings does (*Funke* v *France* 1993; *Saunders* v *UK,* 1997; *IJL, GMR and AKP* v *UK*, 2001). It may be argued that suspects questioned under the other statutory schemes are presented with an explicit imperative to answer questions and a defined penalty for any such failure. Under the CJPOA, they are obliged to make a decision based upon a variety of unknowns, faced with the hypothetical compulsion of an unknown and evidential sanction.

[4] This includes the requirements that convictions must not be based "solely or mainly" on silence (*Murray* v *UK,* 1996) and that juries should be directed specifically to take legal advice to remain silent into account (Condron v *UK*, 2001).

[5] See Chapter 1.

[6] These were revised in May 1999 to incorporate the tests in *Argent* (1997), discussed below. They noted the increasing problems caused by the exercise of s34 and emphasised the desirability of any direction being discussed with counsel before closing speeches. A third version was issued in July 2001 incorporating the requirements of *Murray* v *UK* (1996) and *Condron* v *UK*, (2001), see n4 above.

[7] Such reasoning accords with judicial notions of deserving and undeserving defendants. Judgments have not favoured the latter: recidivists, drug addicts *et al.,* (*Alladice*, 1988; *Goldenberg*, 1988; *Crampton*, 1991). This "defendant-centred subjectivity" (Sharpe, 1997:155) is dangerous as it is easiest to erode the rights of unpopular groups. Parallels may be drawn with how the police may use their powers not merely for law enforcement but also to enforce their authority and command respect (Singh, 1994; Choongh, 1997). This 'disciplinary' attitude contrasts with the reluctance of the courts to exclude evidence in order to punish improper police conduct (*Sang*, 1980).

Having considered the widening application of s34, attention is focused upon the effects of the Act upon legal representation at the police station. The dangers of "common sense" reasoning are considered and finally various assessments of the impact of the legislation.[8]

5.1. Section 35 – "Hobson's Choice"[9] and Inferences from not testifying

The argument that s35 is so at variance with established constitutional principles that its use should be reduced and marginalised as far as possible, was rejected in *Cowan* (1995). As s35 contains no scope for limiting its interpretation other than "where the mental or physical condition of the accused makes it undesirable for him to give evidence" (s35(1)(b)), this implies that the provisions are to be of otherwise general application.[10]

Other than in exceptional circumstances, defendants are expected to cooperate with the trial process by testifying. The Section appears to have reduced dramatically the number of defendants not testifying. The effects of this in evidential terms appear to be restricted by the limited extent of the problem it was intended to address and the requirement that a *prima facie* case must have been established before inferences can become an issue. If a case is weak, an inference is unlikely to carry it over the threshold; if it is strong, the inference will make little difference.[11]

Section 35(1)(b) should not be operated to give too wide a loophole in cases where there is doubt as to whether the defendant is fit to give evidence (*Lee,* 1998).[12] The caveat is to be operated only in exceptional circumstances (*Friend,* 1997).[13] There are no formal guidelines as to the exercise of discretion under s35 and it is not a decision with which the appeal courts will interfere lightly.[14] There should be some evidential basis or exceptional factors for the jury to be directed not to draw inferences (*Cowan*, 1995 at p823; *Friend*, 1997).

Defence counsel cannot suggest reasons for the defendant's silence at trial without supporting evidence; the rule against advocates giving evidence dressed up as submissions was emphasised in *Cowan* (1995 at 946). This "runs counter to the adversarial tradition" (Leng 2001:132). In the linked judgment of *Ricciardi*, the court did not:

> "Think it incumbent on a judge or appropriate for him to embark or invite the

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[8] Little case law relates to ss36-7, as usually inferences will be subsumed by those drawn under s34, and my respondents said little about them.

[9] "Thus the suspect is faced with Hobson's choice – he either testifies or, if he chooses to remain silent, he has to risk the consequences, thereby automatically losing his protection against self-incrimination" (*Murray* v *UK,* 1996 at p51, partly dissenting opinion of Mr E. Busuttil).

[10] Wolchover (2001:217) presumes that it is implied in the Act that the reasonableness of the defendant's failure to testify should be taken into account but there is no authority to support this.

[11] A s35 direction was deemed inappropriate where the only issue was whether the undisputed facts were such as to fall within the offence of keeping a disorderly house. The direction was prejudicial as the defendant could not have said anything to clarify this issue (*McManus,* 2002).

[12] This is a separate, less exacting, test from that which determines whether a defendant is fit to enter a plea.

[13] Friend was fifteen years old when he was tried for murder but had a mental age of nine. At the time of his trial, s35 applied only if the accused was over fourteen.

[14] It is noteworthy that the examples given where inferences should not be drawn, such as triggering an epileptic fit, a mental condition or a florid episode of schizophrenia, relate to the effects of testifying on the defendant rather than on the fairness of the trial. A defendant may be distressed by having to give evidence but be able to provide coherent testimony. Giving evidence, conversely, may have a minimal impact on the defendant's state of mind but create injustice.

> jury to embark on possible speculative reasons consistent with innocence which might theoretically prompt a defendant to remain silent." (at p949)

No elaboration has been made upon the subtle distinction between inadmissible speculation as to innocent reasons for not testifying, and permissible inferences which operate to the detriment of defendants.

Only one of the legal representatives I interviewed described making any tactical efforts to avoid inferences being drawn against defendants for not testifying, ("We've tried to pull all sorts of stunts!" (LE/B8/i)). In one complex trial, the client had Crohn's disease and he was considering obtaining expert reports about how testifying might aggravate this condition:

> "Fact of the matter is, he'll be a bloody awful witness and that's why we're trying to avoid calling him!"[15]

Section 35 may disadvantage those with previous convictions[16] if their defence involves challenging the character of prosecution witnesses, as their antecedents will be put before the jury if they testify (Criminal Evidence Act 1898). The courts refused to accept that inferences should not be left to the jury if defendants did not testify for this reason, as to do so would give such defendants an unfair advantage over those with unblemished records (*Cowan*, 1995 at 944). Inferences were left to the jury in *Fell* (1996), even though there were strong suggestions that the defendant had been threatened the night before he was due to testify. The judge ruled that, if defendants are involved with serious criminals, they should receive no benefit from this. It may be argued that neither should they be disadvantaged by this, as associating with criminals, or being threatened by them, does not necessarily make the defendant a criminal also, or, more specifically, guilty of the crime with which s/he is charged. The judge is not obliged to hold a *voir dire* to determine whether the defendant is not giving evidence through fear or duress (*Chadwick*, 1998). Duress may thus offer a defence to the crime of which the defendant is accused but no protection from the penalties of failing to cooperate with the court.

The weakness of the prosecution case is not, of itself, a ground for withdrawing inferences from the jury (*Byrne*, 1995; *Cameron*, 2001). This reversed the initial decision that inferences should not be drawn from failure to give evidence to contradict parts of a prosecution case of "little evidential value" (*Murray* v *DPP*, 1993).[17] The strength of the presumption that defendants will testify is exemplified by the refusal to withdraw inferences from the jury in the extraordinary circumstances of *Cameron* (2001). In this case, it was submitted that inferences should not be drawn in the interests of equality of arms, as the judge had taken over the questioning of the complainant after she refused to answer further questions put by defence counsel.

The court must satisfy itself that defendants who have not indicated that they intend to give evidence understand the consequences of so declining.[18] The judge may remind the accused of his or her "duty" to answer all proper questions or risk the drawing of inferences, although this should not be done in an oppressive manner (*Ackinclose*, 1996). The Court approved in

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[15] This representative had also sought a psychiatrist's opinion for another of his clients as to whether being held in prison in solitary confinement, without a light and allowed only one hours exercise a week would justify him not testifying. The report concluded, unhelpfully for the defendant, merely that: "Mr [X] has an inordinate fear of the witness box."

[16] Such defendants are often considered to be 'undeserving', c.f. *Dunford* (1990).

[17] At common law, it was considered improper for a judge to bolster a weak prosecution case by making comments on an accused's failure to give evidence (*Waugh v The King*, 1950).

[18] Practice Direction (criminal: consolidated) [2002] 3 All ER 904, para. 44. See Chapter 1, footnote 48. This cannot be overlooked even where the accused has absconded (*Gough*, 2002).

general terms the JSB specimen direction as to how judges should direct juries about drawing inferences from a defendant's failure to testify (*Cowan* 1995, at 945). It may require adaptation in certain circumstances but the judge must direct the jury to consider five essential elements. It is only the fourth and fifth 'essentials' that add to the statutory provisions and most appeals have focused on these tests:

i. the burden of proof remains on the prosecution throughout and the required standard is beyond reasonable doubt;
ii. the defendant is entitled to remain silent;
iii. an inference from failure to testify cannot on its own prove guilt;
iv. the jury must be satisfied that the prosecution has established a case to answer before drawing any inference; and
v. if, despite any evidence relied upon to explain the silence, or in the absence of such evidence, the jury conclude the silence can only be attributable to the defendant having no answer, or none that would stand up to cross examination, they can draw an adverse inference.

At the close of the case for the prosecution, it is the responsibility of the judge to decide whether there is evidence upon which, if assumed to be true and uncontradicted, a reasonable jury could convict (*Galbraith*, 1981). Instructing the jury to repeat this exercise in such a way that they could arrive at a different conclusion to the judge was presumably intended to rebut the suggestion that s35 diminishes the burden of proof. It is, however, unnecessary, abstruse and overlaps with the test for determining guilt (Pattenden, 1998:149). For defence counsel to suggest to the jury that the judge had erred in leaving the case to them would also appear a hazardous strategy.

The Courts have emphasised that the burden of proof, far from being altered or watered down, remains on the prosecution; the effect of s35 is simply to add a further evidential factor in support of the prosecution case (*Cowan*, 1995). This has been asserted rather than explained. Inferences under s35 can elevate a *prima facie* case to a finding of guilt. The House of Lords (*Murray (Kevin Sean)* v *DPP*, 1993) considered that the corresponding Northern Ireland provision was intended to reverse the common law prohibition on treating a refusal to testify as corroborative of guilt (*Sparrow*, 1973; *Mutch*, 1973). Whilst the accused cannot be compelled to testify, the consequent risk is not simply that specific inferences may be drawn from any defence not advanced on oath, but that:

> "...If aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty." (*Murray (Kevin Sean)* v *DPP*, 1993, per Lord Slynn at pp160-1)

As there are no centrally collected statistics as to the number of defendants giving evidence, it is difficult to assess the impact of the provisions (or the extent of the 'problem' that they were supposed to address). Amongst those I interviewed, refusal to give evidence was considered rare (Bucke *et al.*, (2000) had similar responses).[19] Just 10% of Crown Prosecutors, all based at Branch A, had conducted even a small number of such cases. A Senior Crown Prosecutor (C1) said that one firm in his area frequently advises defendants not to testify but that they were exceptional.

Advocates have always had to consider carefully whether or not to call their clients to give evidence. Some thought that the provisions had not made a significant difference as

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[19] In Northern Ireland, the use of Article 4 declined markedly between 1990-95 for both scheduled and non-scheduled offences (Jackson *et al.*, 2000), see Table 4.

magistrates and jurors had always drawn inferences against defendants who did not give evidence.

> "Human nature being what it is, I think any individual... cannot avoid drawing a certain inference when a person flatly refuses to speak in their own defence... it all adds up to a rather devious character." (JP/F)

> "I'm absolutely certain that juries would often say to themselves, although told not to, 'well why didn't he tell us what happened? He's probably guilty that's why'." (Judge/B1)

Certain types of defences, particularly those depending upon the character or intention of the accused are more difficult to present if the accused does not testify:

> "[The jury] want to sum up the kind of person he is, particularly if it's a case of dishonesty for instance, where they want to make their own evaluation about whether that man, to their estimation is dishonest or not. Then it would be stupid in many respects and it would probably be indicative of guilt if they didn't give evidence." (Bar/B6)

Such difficulties must be balanced against the risk that testifying will reveal characteristics that undermine the credibility of the defendant or may antagonise the jury or magistrates:

> "The last thing you need is your obnoxious client losing his temper with the prosecution and proving exactly why he was guilty of a Section 4 [public order offence]!" (Sol/B10/i)

> "[If] the person was such a personality that they would give entirely the wrong impression. Visually as well as auditory, and that may be a value judgment... You'd have to look at the jury." (Bar/B2)

The damage that defendants can wreak upon their cases was the main reason for not calling them before the CJPOA:

> "The defence case is usually at its best at the end of the prosecution case; it's downhill thereon... they go in the witness box, they will start saying things which will take the whole thing totally off course and they'll be open to cross-examination and they are just going to come across as a complete arsehole." (Sol/A5/i)

> "I've lost count of the number of trials I've won where I've won it on cross-examination of the defendant... Whereas at the end of the prosecution case I've felt 'Well, there was a certain doubt there, if the trial ended here and now, they'd have to acquit." (SCP/A5)

Some legal representatives remained of the view that their clients remained more likely to be acquitted by testing the prosecution case without testifying:

> "You can do a fair amount of damage to the prosecution case if you're lucky... the last thing you need is your client in the witness box, flailing around, giving the wrong answers to questions put by the prosecution." (Sol/B10/i)

> "This is the beauty of the art, it may not be justice necessarily, but this is the way it works... the more witnesses the prosecution rolls in, the better as far as

> I'm concerned because you've got more chance of driving a wedge between them. And if you've got five or six conflicting accounts in respect of important points, then there's no inference in the world can put that right." (Sol/A5/i)

Advocates now are in the invidious position whereby calling the client might undermine their case but the inferences from not calling them may be enough to secure their conviction.

Almost one-third of barristers thought that s35 had had a significant impact:

> "As a prosecutor, it's helped in a substantial way... You can deal with many people who aren't *au fait* with the witness box, they have difficulties with questions, you can make a fool of them quite easily by just the very nature of the questions which you are going to put to them and invariably all those good points which the defence make go down the tubes... Invariably the defendant goes in the box and invariably, if you are prosecuting, you have a field day!" (Bar/B3)

> "The rules are now slanted such that it is almost always advisable for them to go into the box and give their side of the story." (Bar/B4)

A quarter of barristers said that s35 had not made a great difference to them when defending because they had tended to call their clients before the law changed anyway:

> "Most people want to get in front of a jury and say 'I didn't do it'... I like calling my clients because I think if my client is an innocent man, I think he ought to get in that box and tell the jury that he's innocent." (Bar/B8)

> "I've always been a fairly robust cross-examiner and it's always seemed to me that a jury who's seen prosecution witnesses knocked about a bit would feel a sense of unfairness if the defendant didn't open himself up to the same thing." (Bar/B13)

Almost one-fifth of barristers described cases in which their clients had been acquitted, despite not having testified. Examples included: if a full account had been given in interview; if supporting witnesses or third party evidence was called; or if the defendant was "a bit simple or slow-witted" (Bar/B6).

> "You see people sometimes these days giving evidence and you think 'that was a grave mistake, you'd be better off [not doing so]', despite the fact that an adverse inference can be drawn." (Judge/B2)

The decision whether or not to testify is ultimately for the defendant to take, as several advocates emphasised. Even before the CJPOA, barristers were supposed to ensure that clients who chose not to give evidence signed a memorandum stating that their decision had been taken voluntarily having received advice (*Bevan,* 1993). Only 13% of barristers mentioned asking clients to do this.[20] One judge (B2) thought that barristers had already "toned down" their advice before the legislation changed, as it had become more common for defendants to claim on appeal that they had been pressurised into signing a statement to say that they did not want to give evidence. Some interviewees recognised the difficulties in changing the behaviour of repeat offenders, what might be characterised as the 'occupational

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[20] Similar objections may be expressed about this as against legal representatives asking clients to endorse their notes before a no comment interview at the police station (see Chapter 3) and to sign defence statements (see Chapter 4).

culture' of defendants:[21]

> "When you get the old lag... who possibly in the past has kept his mouth shut and got away with it... it takes a great deal for him to come across with a change of lifestyle at this time of life." (Stipe/C)

Whilst the direct effects on the outcomes of cases have been limited, it would appear that the provisions have effected a significant change in the conduct of defendants at trial. This should be considered cumulatively with the presumptions relating to the conduct of suspects at the police station under s34 CJPOA, and to submit defence statements under the CPLA.

5.2. The Widening Application of Section 34

Legal argument about s34 has focused on whether or not evidence of no comment interviews should be admitted and, if it is, what inferences can or should be drawn from this.[22] This section focuses on how the courts have interpreted s34 in a manner that is increasingly favourable to the prosecution. The limited safeguards in place are undermined by a lack of consideration on the part of the court, as to how they operate in practice at the police station. This is of particular significance to legal advisers, discussed in the following section.

The procedure for the introduction and exclusion of evidence of no comment interviews was set out in *Condron* (1997). Any defence application to exclude a no comment interview under s78 PACE should be raised at the start of the trial, if necessary at a *voir dire* (it can then be argued that no inference should be left to the jury as there could be no evidence that the accused had failed to mention a fact to the police). Whilst s38(6) CJPOA preserves the right of the court "to exclude evidence (whether by preventing questions being put or otherwise) at its discretion," the courts are very unlikely to exclude interviews other than in "the most exceptional case" other than under ss76 or 78 (*Condron*, 1997; *Kavanagh*, 1997).

A court, in deciding whether there is a case to answer, may draw such inferences from a failure to mention a fact relied upon as appear proper (s34(2)(c)). This means that the more conscientiously the defence lawyer puts the case, the greater the opportunities for the prosecution to resist submissions of no case to answer (Seabrooke, 1999:214). This may be vulnerable to challenge following *Condron* v *UK* (2001). Allowing inferences to be drawn at this stage is effectively to require the accused to cooperate. An inference from pre-trial silence can be used both to make out a case to answer and again to convert that case into a finding of guilt.[23]

If a submission is that no inference should be left to the jury, the judge should be asked only in exceptional circumstances,[24] to rule before the conclusion of all the evidence. Only at this

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[21] Jackson *et al.*, found that refusal to testify remained a strategy amongst a substantial minority of defendants in scheduled trials. They suggested that such a decision was almost certainly against legal advice, as defence counsel view it a 'high risk' strategy (2000:147). For an exploration of such actions as a strategy of political resistance, see K. McEvoy (2000) 'Law, struggle and political transformation in Northern Ireland' *Journal of Law and Society*, 27, 4, 542-571.

[22] As s34 refers to 'evidence' of the accused's failure to mention facts, s78 PACE can be used to exclude no comment interviews. Following s77 PACE, if a judge considers that a defendant had not understood the caution, s34 should not be activated (*Martin,* 1992 at 41).

[23] "The court in determining whether there is a case to answer;" *and* (emphasis added) the court or jury in determining whether the accused is guilty of the offence charged..." (c) and (d) of ss34(2), 36(2) and 37(2).

[24] A suggested example was a situation in which a defendant of very low intelligence had been legally advised to say nothing. Given the generally low intelligence of suspects (see Chapter 3), in order to be

stage will it be apparent what material facts have not been disclosed or why the defendant did not disclose them. Prosecutors should assert in the opening speech simply that there has been a no comment interview. Evidence of the questions asked at interview should be introduced only after a particular fact has been relied upon by the defendant and any explanation given for this may be tested in cross-examination.[25] This is no longer a binding rule (*Griffin*, 1998). It was held that failure to follow this procedure is not necessarily prejudicial to the defendant, although it is difficult to see how it could be otherwise. If the 'common sense' reaction is that the innocent have nothing to hide, presenting evidence of a no comment interview may have a persuasive effect at an early stage in proceedings:

> "The jury will have heard the prosecution milk the accused's silence in interview for all its worth in cross examination and will then have to undergo the gymnastic self-manoeuvre of expurgating those questions and answers from their collective mind." (Tregilgas-Davey, 1997:501)

Magistrates, of course, have to perform even greater 'mental gymnastics', as there is no separation of responsibilities in summary trials. There are procedural difficulties in the magistrates' court as the prosecution has only one right of address; there are no closing speeches, as in the Crown Court. It is impossible, technically, for the prosecution to invite inferences in the magistrates' court, unless raising a point of law at the end of submissions, although the defendant can be cross-examined about any silence. One prosecutor worried that magistrates might have forgotten about a no comment interview by the time the case concluded (PCP/C7).

Most submissions for preventing inferences being left to the jury have been rejected. The drawing of inferences has been delegated almost entirely to jurors. Closer judicial control has been "sacrificed on the altar of simplicity" (Birch, 1999:780). In most cases, evidence should be given and the jury directed carefully as to the drawing of inferences (*Argent*, 1997). The Court of Appeal rejected a distinction suggested by counsel for the *Condrons* (1997) in which inferences would not be left to the jury if silence was for 'tactical' reasons (such as if a suspect gives the legal representative an account suggestive of guilt but refuses to confess; will not give the legal representative a rational account; or risks providing a conflicting account to a co-suspect),[26] whereas non-tactical motives, (such as the vulnerability of the suspect, or inadequate disclosure of the police case), would not attract inferences. (Although such a test seems to have been commended to jurors in *Howell* (2002), in terms unfavourable to the defence, discussed below). The exceptions suggested by the Court where inferences should not be left to the jury have been narrowed. These include: insufficient disclosure of the police case, (see below) where the nature of the offence, or the material involved is so complex, or relates to matters so long ago, that no sensible immediate response is feasible (*Roble,* 1997); if the arrest was unlawful following a breach of the PACE Code, or where the prejudice caused would outweigh the probative value (*Argent,* 1997). The probative value of silence is debatable however, ("Silence at interview has no intrinsic weight," Birch 1999:774) and it will almost always be prejudicial to the defendant.

As s34 derogates from the common law, when the judge rules that a s34 inference should not be drawn, an 'old style' (*Bathurst,* 1968) direction should be given. Without this, the jury would be left "in some no-man's-land between the common law principle and the statutory exception, without any guide to tell them how to regard the defendant's silence" (*McGarry*, 1998). The jury might draw harsher inferences without the parameters of s34. Some legal

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applied only in exceptional cases, this threshold must be so low as to be ineffective as a safeguard.

[25] One barrister described preparing two interview transcripts; one, with the 'no comments' omitted for use in his opening speech and an unexpurgated version for cross-examining the defendant (Bar/B9).

[26] This was in accordance with the Law Society's guidelines published in the *Criminal Practitioners' Newsletter*, October 1994. These had to be revised subsequently.

representatives suggested that this demonstrates a benefit of the CJPOA, as juries had drawn their own, unguided, inferences before the changes anyway. Again the safeguard has been tempered; the absence of a *McGarry* direction will not necessarily result in a conviction being declared unsafe (*Francom and Others,* 2000).

Mountford (1999) saw an abrupt, but brief, change of approach by the Court of Appeal, rendering s34 of no application if the fact not revealed in interview constituted the defence to the charge. It was held that there was no evidential basis upon which the s34 issue could have been resolved as an independent issue. This was swiftly distinguished on its facts (*Milford*, 2001), otherwise "the very purpose of s34 would be defeated." It has been emphasised subsequently that there is nothing in s34 which requires that the issue be one which is capable of separate resolution in the case (*Daly,* 2002; *Gowland-Wynn*, 2002).

Where the exclusion of an interview under s78 PACE means that no inference can be drawn from silence when questioned, inferences may be drawn from silence when charged, as long as this is not unfair (*Dervish*, 2002). This might increase the need for legal representatives to consider handing in statements at charge (Cape, 1997:392), something few of my respondents had considered doing.

Inferences should not be invited without evidence of what questions were not answered. The advantages to the prosecution of being able to put to a defendant the questions that they refused to answer in interview, may be outweighed by the difficulty, delay and expense in obtaining an accurate transcript of the police interview (Bar/B5 and B/10).[27] A prosecutor said that she would always listen to the explanation of the caution to make sure the defendant had understood before seeking to rely upon it. In one case, the officers had given such a poor explanation that she had been unable to invite inferences at trial. Difficulties may be experienced in this respect when seeking to draw inferences under ss36 and 37:

> "As often as not, the police have cocked up the special warning in the first place." (Sol/A5/i)

Six tests were laid out in *Argent* (1997) that have to be met before any inference may be drawn. It is difficult to discern what these add to the statute but they have provided the framework for subsequent challenges. The first four points are for the judge to consider before leaving the matter to the jury. Appeals have fallen under headings four to six and are considered in this order.

1. there must be proceedings against a person for an offence;
2. the alleged failure must occur before charge;[28]
3. the questioning must occur during questioning under caution by a constable (or by an individual provided for in s34(4));
4. the questioning had to be directed towards trying to discover whether or by whom the alleged offence was committed;
5. there must be a fact the defendant has relied upon in his defence and he must have failed to mention this fact to a constable when being questioned in accordance with the section;
6. the defendant must have failed to mention a fact which he could reasonably have been expected to mention when questioned, given the circumstances at the time of questioning.

The provisions and the latest PACE Codes of Practice have effectively extended police

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[27] See Chapter 3, footnote 26.

[28] Presumably this does not apply when inferences are invited under s34(1)(b), where the suspect has remained silent on being charged or officially informed that he or she might be prosecuted.

powers to question suspects in circumstances in which they have sufficient evidence to establish a *prima facie* case and therefore to charge. It was held initially that it could not be argued in such a situation that officers were trying to discover whether or by whom an offence had been committed (*Pointer,* 1997; *Gayle,* 1999). If a suspect makes no comment, therefore, inferences should not be left to the jury. *McGuinness* (1999) allowed inferences in such cases by requiring custody officers to consider any explanation, or lack thereof, given by suspects when applying the "sufficient evidence to prosecute" test (*Ioannou*, 1999; *Elliott*, 2002).[29] The latest revision of Code C formalises this by providing that interviewing must cease when, *inter alia,* the custody officer is satisfied that "all the questions they consider relevant to obtaining accurate and reliable information about the offence have been put to the suspect, including allowing the suspect an opportunity to give an innocent explanation and asking questions to test this." This appears to conflict with the duty of custody officers (s37(1)(b) PACE) to charge suspects as soon as there is sufficient evidence. The test for charging has been raised from sufficient evidence to provide a realistic prospect of a successful prosecution to conviction. This allows the police to put further questions to the suspect which the prosecution can introduce at trial to suggest that it would have been reasonable for the defence to have answered (Cape, 2003:364).

The judge should identify the relevant facts in respect of which the jury may draw a s34 inference (*Gill,* 2001). It was thought initially that s34 would not be triggered if no evidence was given or called at trial, as no facts had been relied upon (*Moshaid,* 1998). This was reversed in *Bowers et al.* (1998).[30] "A fact relied upon" may be established by the defendant answering police questions, submitting a statement to the police, a defence statement under the CPIA, giving evidence, calling or cross-examining witnesses (*Hart and Maclean*, 1998).

Section 34 should be confined to its express terms; inferences can be drawn only from failure to mention a fact relied upon in evidence, mere conjecture is insufficient (*Nickolson*, 1999).[31] A bare admission of part of the prosecution case (as opposed to the making of positive assertions or denials) does not constitute a fact (*Betts and Hall*, 2001). As the purpose of s34 is to allow positive assertions to be investigated before trial, no such consideration applies if the defence merely accept part of the prosecution case (in this case that the injured party was having an affair with the wife of Hall's friend). Inferences may be drawn only if it was reasonable to expect the defendant to have mentioned such facts earlier (*B (MT)*, 2000).[32] If the prosecution introduce facts for the first time at trial, as in *Nickolson*, (1999) it cannot be reasonable to expect the defence to have mentioned the fact previously. Cases such as *Napper* (1997) however, suggest that the Court may consider that defendants should raise issues of their own volition.[33] Whilst the defendant's argument in this case was not strong, such a suggestion sits uncomfortably with an adversarial system.

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[29] Something that those I interviewed said they did anyway, see Chapter 3.

[30] It was held that such an interpretation would render s34(2)(c), allowing inferences to be drawn when deciding whether there is a case to answer, without application.

[31] Several legal representatives told me that they would advise suspects not to answer hypothetical or speculative questions at the police station (see Chapter 3). It would seem unfair if the Crown could then pose such questions at trial, forcing the defendant to chose between risking either inferences being drawn from giving an answer not mentioned previously, or a s35 inference from refusal to answer questions put in cross-examination.

[32] The prosecution could not show that the answer was not merely speculation, as B had not been asked about this matter in interview or cross-examination.

[33] The police questioned Napper about only one of the eight charges he faced at trial. He gave full answers to these questions. It was submitted that inferences should not have been drawn from Napper's failure to testify, as he could not be expected to answer questions about the remaining matters for the first time at his trial, some fifteen months later. This was rejected as the court thought that these matters would not be difficult to recall and "It would have been open to the appellant, when charged... to have voluntarily given his account" (per Taylor LCJ at p21).

The risk of invoking a s34 inference may hamper the presentation of the defence. Relevant facts are not restricted to establishing simply what happened but may involve any explanations or supporting detail the defendant might offer. *Milford* (2001) did not challenge the prosecution evidence or introduce new 'facts'; he offered merely innocent explanations for the events the prosecution sought to establish. His counsel argued that this was not amenable to a s34 inference, as denial of the prosecution case did not constitute a fact. The Court rejected this "narrow sense of an actual deed or thing done," preferring instead the:

> "Fuller sense contemplated by the Oxford-English Dictionary of: 'Something that... is actually the case... hence, a particular truth known by actual observation or authentic testimony, as opposed to what is merely inferred, or to a conjecture or to fiction'."

In *Argent* (1997), the prosecution alleged the defendant had stabbed fatally a man who had asked his wife to dance. Argent gave evidence that he had not been drunk, that no one had asked his wife to dance, and that they had left the club, without being involved in violence, to walk home via a restaurant that was closed. They had talked to the babysitter and knew nothing of the man's death until the police visited his house. Other than talking to the babysitter, these points merely rebutted the prosecution's case; they "were non-facts effectively."[34] Whilst effectively this adds nothing more to the defence than 'it wasn't me'; a detailed rebuttal is likely to be more convincing than an unadorned denial but this now risks invoking inferences.

The jury must consider both the reasons for the suspect's silence and the reasonableness of this decision. When deciding whether the defendant could reasonably have been expected to mention the fact when questioned, the jury must consider factors relating to the accused, the investigation and any legal advice given (Cape, 1997:394). In deciding the reasonableness of a suspect's decision, given the circumstances at the time of questioning, a court should not construe the expression "in the circumstances" (s34(1)) restrictively. Matters such as the time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, personality and legal advice[35] are all relevant. In deciding what is reasonable, a court is to consider the actual accused, rather than a hypothetical reasonable person, with such qualities, knowledge, apprehensions and advice as he was shown to have had at the time (*Argent*, 1997 per Bingham L.C.J. at p33). The lack of a 'reasonableness' requirement in s36 or 37 may cause unfairness as inferences may still be drawn even if evidence under s34 is excluded. Birch laments that:

> "It is a shame that section 36, which overlaps shamefully with section 34, ever came into being." (1997:450)

The jury can draw inferences if they conclude that the suspect's silence could only sensibly be attributed to the suspect having no answer or none that would stand up to cross-examination (*Condron*, 1997). This test, adopted from *Cowan* (1995) in relation to inferences under s35, is inappropriate to apply to questioning in the police station. The prosecution is not expected to provide a complete case against suspects at this stage; suspects should not have to respond to preliminary police enquiries with their finished defence. Whilst an account that will not withstand cross-examination at court may be rejected, an account in interview may appear similarly lacking in robustness but its veracity cannot be deduced in the same way. This was apparently recognised in *Knight* (2003), a case in which a detailed statement had been given to the legal representative before interview. Whilst s34 was intended to encourage a suspect to give a full account to the police, it does not require suspects to subject this account to scrutiny by the police.

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[34] Pupil to Bar/B5, describing a similar case that he had researched.

[35] This has been qualified, see below.

Lies and silence both "derive their evidential force, if any, from the motive behind the accused's evasive behaviour" (Pattenden, 1998:154). The Court of Appeal treats these behaviours differently (*Morgan*, 2001). Defendants receive greater protection if it is proven that they have lied and the judge has to give a *Lucas* (1981)[36] direction, than if the jury infer from their late mention of a fact that they are lying and draw inferences under s34. In *Randall* (1998), the Court of Appeal emphasised the process the jury must be led through in being sure that there is no possible innocent explanation for lies before using them to support the prosecution case. By contrast, the jury could infer that a fact advanced for the first time at trial had been invented before the interview. The significance of the failure of the defendant to mention facts relied upon at trial when first questioned, is whether or not that failure is an indication that the facts adopted or advanced before the jury can be relied upon. Both a s34 direction and a *Lucas* direction may be required if a suspect gives an interview that contains both no comment and lies, then advances new facts at trial. This is likely to be taxing for the jury and consume a great deal of judicial time. If the suspect reveals something at trial which the prosecution claim conceals a fact later relied upon and also constitutes a lie, this raises the novel question of whether a lie can constitute a fact.

The purpose of the legislation is to permit adverse inferences to be drawn where there has been late fabrication "to encourage speedy disclosure of a genuine defence or of facts which may go towards establishing a genuine defence" (*Roble,* 1997). This goes beyond merely combating the 'mischief' of ambush defences. A number of judgments appear to penalise the suspect for failing to cooperate with the investigation and also to hinder the legitimate testing of the police case by the defence. In *Beckles and Montague* (1999), the defendants remained silent pending the results of an identification parade. Once identified, they answered police questions. The Court of Appeal rejected the argument that a 'proper' inference is one that is relevant in determining whether the accused is guilty and not one that is simply adverse to the defendant as such a limited construction would thwart the intention of the Act. The risk of inferences in such cases makes it a risk for suspects and their representatives to test the strength of the police case before interview. The Courts have made much of the necessity of the prosecution establishing a *prima facie* case before inferences can be left to the jury. This is a meaningless safeguard if the decision whether or not to answer questions must be made at a time when the police case could be very weak:

> "Provided that he comments adequately after the evidence is produced, he should not stand to lose anything in consequence of playing the game by the strict rules." (Birch, 1999:150)

Whilst s34 gives no guidance as to what inferences may be proper, there is a presumption that any inference drawn will be adverse (*Condron,* 1997; *Napper,* 1997). Assurances were given that judicial control would provide a due process safeguard against the potential dangers of leaving inferences to juries (D. Maclean, *Hansard,* Standing Committee B. February 1994, cols. 358-362.). The courts have been reluctant to be prescriptive:

> "No hard and fast procedure should be laid down for dealing with inferences under s34; each case will depend on its own particular facts." (*Condron*, 1997 at p836)

The inference the prosecution could seek to draw was restricted initially to subsequent fabrication (*Condron*, 1997). This was expanded upon to include pre-interview falsification. It does not matter whether the defendant could not mention the facts because he invented them after the interview, or would not mention them having fabricated them beforehand, the

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[36] This allows jurors to draw an adverse conclusion only if they are sure that a lie has been given for a non-innocent reason (*Burge and Pegg,* 1996).

issue for the jury is whether the defence is more likely to be false for having not been disclosed immediately (*Daniel,* 1998). Providing the solicitor with an explanation does not protect a defence from criticism on the grounds of late fabrication if the account does not give full details (*Taylor*, 1999); although a very detailed consistent statement may avert inferences (*Knight,* 2003). Permissible inferences include also that the defendant was unwilling to be subjected to further questioning, had no innocent explanation to give, or none that would stand up to scrutiny (*Daniel,* 1998). These are purely speculative tests, of little reliability and are essentially punitive. The defendant may be unwilling to be subjected to further questioning for any number of reasons, not necessarily consistent with, or indicative of, guilt.

Amongst my respondents, the testing of s34 in court was relatively rare. Very few legal representatives had conducted a case in which s34 was an issue. Almost 80% of barristers had contested only a tiny number of cases in which inferences from a no comment interview had been left to the jury. The highest estimate of cases involving a no comment interview was 5-10% (Bar/B1) but the jury had been invited to draw inferences in only one of these cases.[37] One barrister had had "quite a few" cases where his clients had made no comment at the police station but this rarely became an issue at trial as it was resolved by the prosecution accepting that the advice was reasonable or that the questions had not been put fairly. Others noted that they do not get to see many of these cases, as appropriate advice means that no charges are brought (Bar/B5). Another said he rarely had no comment interviews but that s34 inferences from late mention of facts was something that happens "quite a lot" (Bar/B8). Staff from both CPS branches gave similar estimates of how often no comment interviews came up at trial: 30% said "rarely"; 70% said in less than 5% of cases. A Crown Prosecutor suggested that every time she had prepared to invite inferences in a trial, the defendant had pleaded guilty just before it began (SCP/A2). Some suggested that no comment continues to be a defence strategy in cases such as domestic assaults in which there is a strong possibility that the complainant will not attend court. If the complainant does attend, the defendant pleads guilty.

The courts have interpreted the provisions boldly. They have created a culture of expectation that suspects should assist in the trial process. This is illustrated by the refusal of some judges to refund legal aid contribution orders if suspects made no comment at interview, reasoning that they have partly brought the case upon themselves (*The London Advocate*, October 1999; Sol/E2/ii).

5.3. A "Fundamental Dilemma": The 'No Comment' Interview and the Undermining of Legal Representation

The ECtHR has acknowledged that the provisions place the accused in a "fundamental dilemma" and emphasises the "paramount importance" (*Murray* v *UK,* 1996 at p60) of legal advice to suspects at the police station in ensuring fairness. This fails to recognise the dilemma that the legal adviser now faces. Solicitors have to consider not how strong the police case is (which they may not know if the interviewing officer will not disclose it) but how strong it might be should the case come to trial. Advising a suspect to answer questions may provide the police with sufficient information to charge; whereas recommending no comment may result in inferences being drawn that strengthen a weak prosecution case to the required standard of proof. The Court fails also to recognise that the safeguards provided at trial, such as allowing inferences to be drawn only once the prosecution has established a

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[37] This was interesting as the majority of this barrister's criminal work was prosecuting fraud type cases where additional restrictions relating to silence apply. He thought that prosecutors were content merely to cross-examine defendants on their silence and were reluctant to invite inferences to be drawn.

prima facie case, do not apply when the suspect and solicitor actually make their decision.

There is an irreconcilable tension between s58 PACE, which provides the right to legal advice at the police station and s34 CJPOA. Implicit in the right to legal representation is the assumption that the professional offers expert advice to the lay client. It was argued in *Condron* (1997) that if a legal representative had advised a suspect to make no comment, evidence of that interview should be excluded. Defence counsel "resiled from this extreme position, recognising that if it was correct it would render section 34 wholly nugatory" (Stuart-Smith LJ at p833) as any competent solicitor would then advise silence.[38] The court considered that:

> "It is not so much the advice given by the solicitor, as the reason why the defendant chose not to answer questions that is important."

To which the self-evident, if circular, reply would be "because my solicitor told me not to." As *Howell* (2002) responded in cross examination: "Well, what was the point of me having a solicitor there, if I wasn't going to actually take his advice?" Given the inherently coercive nature of police detention, described in Chapter 3, and the physical and mental condition of many suspects in custody, it is unreasonable to expect them to have the wherewithal or the inclination to challenge the advice of the one person who is acting on their behalf:

> "With the more inexperienced or vulnerable defendants, particularly the younger ones, it's not unreasonable to expect them, if they're told by a chap in a suit to say 'no comment', then they are going to do that without question really." (SCP/A5)

Legal advice is "a very relevant" circumstance to be taken into account by a court in deciding whether the defendant could reasonably have been expected to mention the fact relied on at that time (*Argent*, 1997). The jury is not concerned with the correctness of the solicitor's advice, nor with whether it complies with the Law Society's guidelines, but with the reasonableness of the defendant's conduct in all the circumstances. (Although the jury was asked in *Howell* (2002), to consider whether a solicitor would have been likely to advise silence). The Court approved the trial judge's direction to the jury on this matter:

> "You should consider whether or not he is able to decide for himself what he should do or having asked for a solicitor to advise him he would not challenge that advice." (at p34)

It is difficult to conceive of a situation in which it would be more reasonable for a suspect to follow the advice of his representative than where his solicitor considered his understanding of English to be insufficient to deal with difficult legal concepts and she was unclear as to what his instructions were (*Roble*, 1997). The Court of Appeal disagreed however; as the solicitor did not give evidence of all the facts her client had told her, they did not know the basis upon which she had formulated her advice. To follow the judges' own reasoning, if they are not considering the correctness of the solicitor's advice, they do not need to know the logic underpinning it. Such analysis demonstrates further the application of double standards by the courts. Reasons for the legal representative's advice are deemed irrelevant when they are adduced to avoid inferences or to support excluding the interview (it is the defendant's reasons for silence that are significant) but the lack of reasons may be used as justification for drawing inferences. Once privilege is waived, the reasons may be explored and exploited by

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[38] Leng (2001:127) describes this as a "policy driven" decision. It ignores the low rates of silence before the changes but accords with the rhetoric about 'professional' criminals, abetted by their overly adversarial lawyers, abusing their rights. A view challenged by the working practices and cultures of legal representatives described in Chapter 3.

the prosecution to encourage the jury to draw inferences:

> "Whilst the Court has held that the correctness of legal advice is irrelevant, it has engaged in a *post hoc* evaluation of precisely that issue." (Cape, 1997:402)

Contrary to early expectations, and indications from the Court of Appeal (*Roble*, 1997) inadequate police disclosure does not justify the exclusion of a no-comment interview; rather it should be left to the jury to consider the reasonableness of the advice (*Argent*, 1997; *Kavanagh*, 1997; *Imran and Hussein*, 1997).[39] Judge B/2 was "fairly unsympathetic" to defence claims that no comment was advised due to inadequate police disclosure:

> "The suspect is told at the time 'the reason we want to know where you were on such-and-such a day is because we suspect that you were responsible for this crime.' It seems to me, that's quite good enough."

Such limited detail is, however, insufficient for the legal representative to assess the merits of the police case; whether it is inadequate to justify the arrest, or sufficiently strong for them to charge immediately. The presence of the lawyer may perversely disadvantage suspects who remain silent, as it may be reasoned that few legal advisers will recommend silence now:

> "Any lawyer worth his salt is going to say 'if you've got an alibi, you've got to declare it now'... if there was a lawyer present, it would probably look a bit more suspicious." (JP/B)

The possibility of the legal representative having to give evidence has introduced tensions into the professional relationship. Some representatives ask suspects to sign disclaimers before making a no comment interview, to protect themselves from criticism at trial, as described in Chapter 3:

> "... The client may perceive the representatives as a potential defence witness rather than as an adviser *per se.*" (Sharpe, 1998a:563)

Representatives may have to give evidence at trial about the advice they gave. The bare assertion that a suspect remained silent on legal advice does not constitute waiver of privilege but, unadorned, such an explanation is unlikely to avert inferences (*Condron,* 1997). Legal privilege is waived if the defendant or lawyer gives or elicits evidence of the grounds for advising a no comment interview. (Observations, such as the suspect's physical or mental condition, as opposed to instructions are not privileged (*Jones* v *Goodrich*, 1845)). Once this happens, the legal representative can be asked about any other reasons for the advice, including whether it was for tactical reasons, the nature of the advice, and the factual premise upon which it was based (*Bowden*, 1999). This does not contravene Article 6 as the suspect experiences only the "indirect compulsion" to waive privilege of being able to offer merely a bare explanation as a defence (*Condron* v *UK*, 2001). The Law Society recommended that solicitors advising clients to remain silent, should state this in the present tense at the start of the interview, as the advice is then delivered in a non-privileged situation. Caution must be exercised however, as in *Fitzgerald* (1998), such a statement was adduced by the prosecution to indicate a prejudicial connection between the suspect and the others in custody. Privilege is not waived if the defence seek to rebut an inference of subsequent fabrication by showing

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[39] Birch (1999) suggests that the severity of the judgments is mitigated by the weakness of these cases and the unrealistic requests for disclosure. The courts have taken a different view of inadequate disclosure before the suspect is considered for a caution (*DPP* v *Ara*, 2001). The distinction presumably is that the acceptance of a caution is akin to a guilty plea in court, accordingly the solicitor should be entitled to the same disclosure.

that the relevant fact was communicated to the solicitor at the time of the interview, (*Wilmot*, 1988; *Condron*, 1997). Difficulties may arise in adducing a statement made before the interview if the prosecution does not suggest an inference of recent fabrication. Such a document would be considered to be merely a previous consistent statement. This may of course be the inference that the jury draws. The giving of evidence at a *voir dire* as to the reasons for legal advice for silence operates as a waiver of privilege at trial even if the evidence is not repeated before the jury:

> "The defendant cannot at any stage have his cake and eat it; he either withdraws the veil and waives privilege or he does not withdraw the veil and his privilege remains intact. But he cannot have it both ways." (*Bowden*, 1999, per Bingham LCJ at p51)

It would appear however, that the prosecution can enjoy the best of both worlds, as suspects either have an unexplained silence from which inferences may be drawn, or they seek to explain this and have to waive privilege.

Only one of the legal representatives I interviewed had given evidence as to why he had advised a no comment interview. Three-quarters of the representatives who expressed an opinion said that they would not be troubled by having to give evidence. The others were concerned, through fear, ("It scared the living daylights out of me," Sol/A12/ii); a belief that solicitors should not have to justify their advice (Sol/A13/iii); because of the financial implications of losing a client; or having to appear unpaid as a witness (Sol/B2/i).

More than half of the barristers interviewed had called a legal representative to give evidence about their advice of a no comment interview (57%). Of those who had not done so, one said that, in most cases, he had not needed to call them as it had been good advice (Bar/B5). The only solicitor he had called had been on holiday at the time ("I have very strong grounds to suspect that her holiday was booked very late on"). Some were unsure of the tactical benefits of calling solicitors:

> "Highly unlikely that you'd ever want to call the solicitor to say why did he give that advice. I think it would, can, only look damaging. One, I don't think it's professionally very good but two... it looks pretty desperate." (Bar/B12)

A quarter felt uncomfortable about cross-examining a fellow professional and the tension that this could introduce between solicitor and client (Bar/B3 and B4). Barristers may experience conflict from the commercial pressure not to alienate those who give them work.[40] This may cause particular problems for those who undertake both prosecution and defence work:

> "It's such a tight community... one day you can be prosecuting, you know [X]'s client and the next day, you're acting on his behalf, and the day before you called him an absolute wazzock!" (Bar/B1)

Cross-examination of legal representatives is less likely in the magistrates' court (SCP/A11). This may be too legalistic a point to engage magistrates. A solicitor cannot represent a client and be called as a witness in their cause. New representation would have to be sought which is not in the solicitor's interests. Fewer than 10% of Crown Prosecutors had cross-examined solicitors regarding their advice. Opinion was fairly evenly divide about doing this but all those who wanted to were from Branch C. Some Branch C Prosecutors thought that if a local solicitor was called to give evidence, the case would be transferred out of the area.

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[40] C.f. the virtues of the independent bar, extolled by many barristers in Chapter 4.

Whilst a stipendiary magistrate (C) said that he would "find it very difficult to visit the sins of the lawyer on the defendant," one barrister thought that the likeliest source of miscarriages of justice following this legislation was from suspects being poorly advised to make no comment in interview. Poor legal advice is difficult to establish as a ground of appeal (*Nangle*, 2001). Some legal representatives were shockingly complacent about the provisions:

> "I've probably done 500 trials in the magistrate's court, never, ever known it. So much so, I can't remember the law on it, never had to bone up on it because I've never, it's something I needn't concern myself with." (Sol/B11/i)[41]

> "I don't think it harms you if you give a no comment interview. I can't see what inference, if it's a straightforward case where you are going to say x, y and z and you don't say it first time round but you say it at court, I can't see how the magistrates are going to draw an inference." (Sol/D13/ii)

The ECtHR has emphasised the importance of legal advice to suspects when deciding whether or not to answer police questions. It was suggested in *Averill* v *UK* (2001) that a good reason for not drawing an adverse inference was "*bona fide* advice received from his lawyer" (para. 47). In *Condron* v *UK* (2001), the ECtHR held that the fact that an accused has been advised by his lawyer to remain silent must be given "appropriate weight" by the domestic court as there may have been a good reason for such advice (para. 60). As a matter of fairness, the jury should have been directed that they should not draw an adverse inference if they believed that the applicants' silence during the police interview could not sensibly be attributed to their having no answer to the questions or none that would stand up to cross-examination. It is essential to a fair trial, rather than merely 'desirable' as the Court of Appeal held, for the judge to direct the jury not to draw an inference if they were satisfied that the applicants remained silent on legal advice (para. 62). This was accommodated into domestic law by *Betts and Hall* (2001), in which it was held that it is not the quality of the suspect's decision to remain silent that matters but the genuineness of that decision. The Court emphasised that this is not a shield behind which the guilty may hide. The adequacy of the explanation may be relevant as to whether the advice was the true meaning for not mentioning the fact. This is an entirely speculative exercise. It appears likely that the jury's assessment of the suspect's decision making is likely to be synonymous with their view of the defendant's guilt or innocence.

The case of *Howell* (2002) is a "mischievous decision which has created inconsistent case law on the important issue of the evidential consequences of remaining silent on legal advice" (Choo and Jennings, 2003:185). The reasoning was endorsed in *Knight* (2003). The Court rejected the reasoning in *Betts and Hall* (2001) that if the suspect has genuinely relied upon legal advice, adverse comment is thereby disallowed. It was held rather that:

> "The premise of such a position is that in such circumstances it is in principle not reasonable to expect the suspect to mention the facts in question. We do not believe that is so."

An innocent person will generally be expected to seize the chance of denying the allegations.[42] The only 'good' reasons for remaining silent will be those approved of by the Court. The likelihood of a reason being considered good may well accord with whether or not the defendant is considered 'deserving' or innocent. The Court gave examples of what would not be considered reasonable: the absence of a written statement from the complainant;

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[41] Such ignorance is of course self-perpetuating, as he is unlikely to advise a client to remain silent if he is unaware of the provisions.

[42] This constituted a misdirection under the common law (*Sullivan*, 1966 at 105).

the likelihood that the complainant will withdraw; or the solicitor's belief that the suspect will be charged anyway:

> "There must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police. Solicitors bearing the important responsibility of giving advice to suspects at police stations must always have this in mind."

These inhibit the defence from testing the police case and allow the police to question the suspect no matter how tenuous the evidence. This effectively puts the onus upon the suspect to answer questions. The Court considered the purpose behind the legislation:

> "[Section 34] ... Is one of several enacted in recent years which has served to counteract a culture, or belief, which had been long established in the practice of criminal cases, namely that in principle a defendant may without criticism withhold any disclosure of his defence until the trial. Now the police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning... This benign *continuum* from interview to trial, the public interest that inheres in reasonable disclosure by a suspected person of what he has to say when faced with a set of facts which accuse him, is thwarted if currency is given to the belief that if a suspect remains silent on legal advice he may systematically avoid adverse comment at his trial. And it may encourage solicitors to advise silence for other than good objective reasons."

The Court considered its approach to be consistent the approach of the ECtHR which in *Condron* v *UK* (2001) referred to suspects remaining silent *for good reason* on the advice of their solicitor (emphasis in *Howell,* 2002). It is unclear whether Strasbourg will accept this interpretation. There is even less evidential value in speculating why a client accepted legal advice than in inferring guilt from silence. It is dangerous to ask jurors to add another tier of speculation to their assessment of the evidence. It risks multiplying the negative effects of silence and 'short-circuits' the deductive reasoning that leads from silence to guilt. A jury might accept that a suspect remained silent on legal advice, yet convict them upon other evidence; they are unlikely to assume a suspect accepted the lawyer's advice because he or she was guilty and then acquit. If the solicitor has to testify, this is likely to attract a disproportionate amount of the jury's attention compared to its evidential value (Birch, 1999:786).

As discussed in Chapter 3, the risk of invoking inferences undermines legal representatives' bargaining power to ensure the fair or legal treatment of clients at the police station. The judgment in *Howell* (2002) develops the approach in *Beckles and Montague* (1999), effectively preventing the adversarial testing of the police case. Advisers now have to assess not only the current strength of the police case, whether or not the police are willing to disclose it, but also its potential strength should the case come to trial. The legal representative's role at the police station is solely to protect and advance the suspect's legal rights (Code C, *Notes* 6D, PACE), not to advise "for good objective reasons." The Court has approved the protective function but advice relating to the presumption of innocence or putting the prosecution to proof is regarded as tactical or 'bad' advice rather than a proper response in an adversarial context. It cannot be said that the role of legal representatives has been reduced to ensuring procedural compliance, for without a right to know the police case, this is impossible. It appears that the Court considers the role of the adviser should be merely to facilitate the expeditious processing of their clients.

5.4. The Dangers of 'Common Sense' Inferences and a Lay Tribunal

Whilst the judge is responsible for the fairness of the trial, it is for the jury to decide what inferences are proper as "the jury is the tribunal of fact and that Parliament in its wisdom has seen fit to enact this section [34]" (Bingham LCJ, *Argent*, 1997 at 32).[43] This classification of inferences as facts is misleading. It is the function of magistrates and jurors to bring to bear their experiences and knowledge to assess the evidence, witnesses and defendants before them. The CJPOA asks them to speculate upon the absence of evidence or the defendant's refusal to participate in the process. Allowing jurors to draw inferences from silence "may result in inconsistent, unreasoned and unappealable decision making" (Sharpe, 1997:153).

The judges in *Birchall* (1999 at 312), whilst "reluctant to countenance the view that direction of a jury called for the mouthing of a number of mandatory formulae," recognised the risk of injustice and of criticism from Strasbourg, unless the provisions were the subject of carefully framed directions to the jury. Clear directions are particularly important given the inscrutability of the jury's verdict[44] (*Condron* v *UK*, 2001). These judicial directions have been criticised for their complexity. Jurors may be ill equipped or unwilling to perform the intellectual contortions required by the direction. Section 34 has been condemned as:

> "A headache for the conscientious jury, and a tool with which the slapdash, incompetent jury may wreak injustice." (Birch, 1999:772)

One of the two judges I interviewed, having expressed cautious support for the changes,[45] qualified his "common sense," approach to allowing juries to draw inferences by saying:

> "There are ways you can steer a jury, and I don't mean that nastily, I mean that if I thought it would be unfair for them to draw an inference, I would tell them so." (Judge/B1)

The other had been "swept along with all the reservations that the profession expressed" when the CJPOA was enacted. He thought that matters should be kept simple for jurors and that judges should be "generous to defendants" in not allowing adverse inferences to be drawn. He acknowledged that he had not seen any injustice resulting from the Act yet (Judge/B2). It was thought that most judges had been in favour of the changes to the right of silence (*Alladice*, 1988; Taylor, 1994). My respondents had mixed experiences of how judges were utilising the provisions.

> "I'm not so worried about the magistrates, the Crown Court I'm a bit more concerned about... A lot of the judges are very pro-prosecution." (Sol/A7/ii)

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[43] Wolchover (2001:62) and Dennis (2002:29) suggest that the second part of this sentence reveals Lord Bingham's disapproval of the CJPOA. This seems unlikely from his public comments, (e.g. 'Silence is Golden – Or Is It?' address to the Criminal Bar Association, October 14, 1997). This comment followed his criticism of the trial judge's ruling that no inference should be drawn from Argent's silence at the first interview. Lord Bingham's comments could be construed as a warning to judges who disagreed with the provisions that they should not interpret the law in a manner that frustrates the will of Parliament.

[44] Bratza, J. placed great emphasis upon the giving of reasoned (and thus reviewable) verdicts by 'Diplock' judges in his partly dissenting judgment in *Murray* v *UK*, (1996). Where a jury sits as the tribunal of fact, these safeguards do not apply. The domestic judges in *Cowan* (1995) saw no reason to make this distinction provided that the judge gives proper directions as juries in criminal trials draw inferences in numerous situations.

[45] "If you were prosecuting, it was very hard for you not to be able to comment... The rather elaborate procedures we have now could probably have been overcome by allowing prosecution counsel to make comments and then the jury could make what they would of it." (Judge/B1)

Some thought that judges were reluctant always to invite inferences or to exercise their powers as far as they might (BCP/A10) due to the risk of giving guilty defendants an escape route on appeal (Bar/A1), or from a sense of fair play:

> "Bad laws... shouldn't be sustained by good judges... one depends on the decency of the judge and so you can have a different result, with the same crime in front of different judges." (Bar/B6)

The prohibition upon research into juries means that it is not known to what extent jurors are drawing inferences, nor indeed, to what extent they did before the CJPOA:[46]

> "It worries me a little bit with juries... I do wonder whether they understand the directions given to them by the judge." (PCP/A14)
>
> "Juries make up their own law without us knowing it." (Bar/B2)
>
> "I don't think [CJPOA] had that much effect with juries because I don't think they understand it." (LE/B8/i)

Defence lawyers were anxious to avoid inferences becoming an issue at the magistrates' court as it was thought to be much more difficult to persuade magistrates than judges of the legal arguments against drawing inferences:

> "It's much harder in the magistrates' court to have any kind of legal argument." (Bar/B12)

The stipendiary and lay magistrates had differing views about the changes. Stipendiaries were divided about the changes:

> "I was as concerned as most people were." (Stipe/C)
>
> "I felt quite comfortable about them... [After PACE] the safeguards for the defendant were at the expense of the considerations one ought to give to society at large and the victims of crime." (Stipe/A)

Whereas the lay magistrates had all been in favour of the changes:

> "A step in the right direction." (JP/F)
>
> "Fairly relaxed." (JP/J)

Few magistrates had much experience of the provisions. This might indicate that their support for the changes was based on a sympathy with the prosecutorial values of the changes

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[46] The current debate about curtailing the right of defendants to elect trial by jury appears polarised between the familiar rhetoric of criminals exploiting their rights in order to evade justice and due process defence of the rights of the individual. Whilst many of those who opposed the CJPOA also defend the right to jury trial, it may be that juries are unsympathetic to the right of silence:

> "People over here don't understand the right of silence, it hasn't become a part of popular culture like it has in the States. People speculate in the States as much as they do here but they've got the Fifth Amendment and that is such a holy object.... Everybody knew that OJ Simpson was guilty, everybody knew that's why he didn't give evidence, he was still acquitted. He wouldn't have been acquitted here... It has always been the common view, right back to the 17th Century witch-hunts 'you will speak out in your defence if you've got a defence and if you haven't, keep your mouth shut'." (Bar/A1)

rather than personal experience. The complexity of the provisions meant that some magistrates want to avoid the issue altogether (Clerk/F). One clerk believed that some magistrates prefer to be told what inference to draw and that in busy courts, some clerks do "overstep the mark" (Clerk/C). Concerns were expressed by both prosecuting and defence lawyers about the varied standards of justice at the magistrates' courts.

> "Magistrates vary so much from bench to bench. You cannot generalise, it's impossible. You can't even generalise about the likelihood of a conviction or not because they do vary so much." (SCP/A11)

> "The general rule is, you keep as much law out of the magistrates' court as you possibly can, unless you've got a stipe. A lay bench you see, you want to avoid that sort of thing [legal argument about inferences] if you possibly can." (SCP/A3)

One solicitor thought that if defendants do not testify after a submission of no case to answer fails, they are very unlikely to be acquitted:

> "...The standard that gets applied by most magistrates in most trials is in fact little more than the balance of probabilities... My clients very often are put in the position of having to prove their innocence rather than the other way round." (Sol/E3/i)

A magistrate told me that, where previously the late production of an alibi might have prevented a case from being proved beyond reasonable doubt, now the inference could be drawn to prove their guilt because "any normal person" would have put it forward earlier (JP/B).

The court clerks said that inferences from silence were so rare that they would have to look up the procedure for directing the magistrates. They had varied views about the legislation:

> "I felt comfortable with them, yes, I thought that was a reasonable compromise between someone's right for the prosecution to have to prove the case against them beyond reasonable doubt, but the right for the hearing not to be sprung with last minute surprises." (Clerk/C)

> "From a constitutional point of view I have serious reservations but in practical terms, for the administration of justice, I think it is probably better." (Clerk/J)

There was a general sense that magistrates do not like defendants not giving evidence and that they drew inferences prior to the CJPOA anyway, making the effects of s35 less marked in summary trials (see also Bucke *et al.*, 2000:53).

> "Magistrates think you're an awkward sod if you don't give evidence... Your advice would vary depending on where the case is to be heard." (Sol/A15/i)

> "[Lay magistrates] think 'no comment: guilty'." (Clerk/F)

Those who are not legally qualified may have little sympathy with traditional legal principles or ideologies (Roberts, 1995:785), although it should be noted that the greatest incursions into the right of silence and the associated principles have been made by the legally qualified. Without an understanding of or sympathy towards such values however, there is a danger that "common sense" assumptions about silence provide a short cut to determinations of guilt. In this context, it is noteworthy that the latest JSB direction substitutes 'inferences' with

'conclusions.'

5.5. The Impact of the CJPOA

Calls for the repeal of the silence provisions have been made on the pragmatic grounds that its benefits are outweighed by the burdens it imposes (Birch, 1999:770). Complaints have been made that the CJPOA is unfairly testing of jurors and magistrates, has lengthened legal consultations at the police station, led to more legal argument, more complex summings up and directions, and unnecessary and otherwise unmeritorious appeals. The provisions have "made life more complicated" (Judge/B1) and:

> "Have contributed more to the complexity and cost of the criminal process than to justice." (Leng, 2001:125)

The limited extent of the 'problems' the CJPOA was introduced to tackle have meant that it has had a less dramatic direct impact than had been suggested by those on both sides of the debate. Whilst it is difficult to isolate the effects of any statute on crime statistics or on the quality of justice received by defendants, particularly at a time of such rapid change in the criminal justice system, it appears that the silence provisions have made little impact. Studies of the Northern Ireland Order found that it had not resulted in a rise in clear up, plea or conviction rates for scheduled or non-scheduled offences (JUSTICE, 1994; Jackson, 2001:143). Jackson *et al.*, (2000) found that inferences were not drawn mechanically. In the majority of cases in which the Northern Ireland Order was a potential issue, inferences were drawn to 'copper-fasten' an already strong Crown case.

Amongst my respondents, whether prosecuting barristers invited jurors to draw inferences from a no comment interview depended in part upon the age, experience and mental agility of the individual defendant, whether legal advice had been given, the strength of the prosecution case and whether relevant questions had been put in interview.[47] Some would just challenge defendants about their (lack of) response in cross-examination (Bar/B3). When asked whether they would always invite inferences from a no comment interview or a defendant's failure to testify if prosecuting, more than a quarter of barristers said that the CPS would expect them to. Opinion was evenly divided amongst the other barristers who expressed a definite view about inviting inferences:

> "The trouble is, when you are prosecuting, you tend to see it with a different hat on, don't you? So you just grasp at any help you might have to prosecute." (Bar/B6)

Others regarded automatic use of the provisions as breaching the barristers' unwritten code of conduct (see Chapter 4):

> "It may also smack of seeking to get the prosecution at any cost... Although the prosecution may appear to be there to hatchet everybody, I don't concede that to be our rôle. At the Bar, you have the privilege, in a way, of being independent. You get to prosecute and you get to defend. It doesn't do, or it

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[47] Research examining the Northern Irish provisions found that inferences were not sought automatically. Prosecution counsel only commented on the silence in half of the non-scheduled cases in which it occurred and the judge directed the jury that they could draw inferences in only half of these cases. Inferences were drawn in just 44.4% (Article 3), 32.2% (Article 4), 29.5% (Article 5) and 31.9% (Article 6) of scheduled cases in which live issues were raised (Jackson *et al.*, 2000).

[47] Those who answered more generally implied that inviting inferences was not an imperative, or even very significant, which took the figures to almost 2:1 against so doing.

> never looks good, to be some kind of over the top advocate taking every point." (Bar/B12)

An analogy was drawn with the cautious use of the right of prosecutors to put a defendant's previous convictions before the court in certain circumstances:

> "It might be different in the magistrates' court because you get some quite zealous, professional CPS prosecutors but when it comes down to counsel, they rarely get involved with that... they don't feel it makes the game fair, it feels as though they are taking advantage of a defendant's background and also the result is almost a foregone conclusion... It's so easy to do, it's almost unprofessional to do it, unless you feel that it is absolutely necessary... Most barristers defend and prosecute and they look at it from both angles." (Bar/A1)

Crown Prosecutors were much readier to seek inferences from no comment interviews, in principle at least. Two thirds of prosecutors at Branch A qualified their use of the provisions as depending on the circumstances and the other evidence, whereas more than 80% of Branch C prosecutors were unequivocal:

> "Having got past the half way stage, I think it would be remiss of me, as a prosecutor, not to draw attention to the fact that they can draw that inference. I think it is incumbent upon me to do so." (SCP/C1)

> "If you've got a case and you've got victims to consider, you've got witnesses to consider and you're satisfied the case is there, then you're going to do your damnedest to make sure you get the conviction and that is a perfectly correct way of proceeding." (PCP/C9)

Some were of the view that jurors and magistrates had always drawn inferences anyway from late mention of a fact or failure to testify and the changes merely:

> "Legitimated what was already in practice happening, particularly in the magistrates' court." (SCP/C8)

The majority of Crown Prosecutors felt that the changes had been of benefit to them:

> "It's marginally more helpful. It's not an enormous thing in the prosecution's favour, it's just the common sense moves really." (SCP/A11)

> "It's helped level the playing field which was stacked against us." (EO/A4)

Those at Branch C were more sceptical as to whether the changes had made any real difference, 40% expressed doubts, only 7% at Branch A did so:

> "I don't think that the effect has been as extensive as those who introduced it thought it would be. Simply because I don't think the problem was as great as those people perceived it to be." (SCP/A5)

> "Politically probably a show for the public, in real terms, no big difference... There are so many let outs to the use of the right of silence that it effectively has no teeth. Waste of time." (PCP/C9)

Barristers had been generally hostile to the CJPOA (RCCJ 1993, Ch. 4, para. 13). Almost 80% of those I interviewed condemned the changes made to the right of silence:

> "Wrong against principles of English law, wholly undermining the Golden Rule." (Bar/B7)

> "An unnecessary and, I thought, retrograde step." (Bar/B13)

Two-thirds of barristers and almost a quarter of those legal representatives who had been concerned about the new provisions said that, having worked under the new provisions, the effects had not been as bad as they had feared:

> "I was quite concerned about it, I think, now it's been in operation for some time, I'm not that bothered about it." (Sol/A12/ii)

> "Sounding cynical, you just tend to find them making up their stories at an earlier stage." (LE/B8/i)

The rhetoric employed in support of the changes described the benefits for tackling serious crimes. Few of my respondents thought that the CJPOA had made much difference in such cases:

> "Professional criminals have either covered their tracks so well, or give interviews which are well prepared... They would probably still not give evidence." (Judge/B1)

> "Professional villains, if they're there, they will remain silent come what may, unless they see some advantage to it. By and large, professional villains don't get caught if they're professional villains. On the occasions that they do get caught out, they've been caught red-handed and they know they are going to go down for a long period of time... [so] why sit in a police station having to answer some copper's questions?" (Sol/B2/i)

Before the CJPOA, it was said that 'no comment' interviews caused greatest difficulties in cases in which police and prosecutors have to establish *mens rea*:

> "It's very difficult establishing a mental element when someone doesn't tell you what's in their mind." (SCP/C2)

In the most common example I was given, handling stolen goods, the change in the law makes little difference to the chances of a successful prosecution as silence can still "stymie it fatally" (SCP/A5).

None of my respondents told me of cases in which they thought someone had been wrongfully convicted due to inferences from their silence. A few gave examples where they thought a conviction would not have been achieved without inferences:

> "The prosecution evidence was so thin, that if it had been a stipendiary magistrate and not a lay bench in [Town J], I'm sure he would have been acquitted and I don't think I would have needed to call him." (Sol/J14/i)

One solicitor was considering appealing a case, having called his client after a failed submission of no case to answer:

> "The consequences of the direction were pretty potent because he had a lively and attractive defence... I think, pre-Act, the verdict would have been different." (Bar/B13)

Prior to the changes, if it was suspected that magistrates had drawn inferences to bring a weak prosecution case up to the standard of proof, an appeal might have been successful:[48]

> "In practical terms, it [the CJPOA] doesn't make any difference, it just stops you appealing." (Sol/D9/iii)

Notwithstanding the restraining influence of the ECtHR, the courts have widened the parameters of the Act.

> "The larger picture that emerges from the CRIMPO [CJPOA] cases is of a Court of Appeal so committed to crime control that at almost every turn – even when an interpretation favourable to the defence is plausible – the legislation has been construed in the prosecution's favour." (Pattenden, 1998:164)

Most of my respondents had encountered too few cases to be able to discern any trend in decision making. Those who could, agreed that the law was being interpreted more strictly (Stipe/A):

> "There was a bit of a leading-in period when it first came in." (EO/A4)

> "When the change in the law first came in, it wasn't too difficult to persuade judges not to give a particularly strong direction or take it strongly into account with the jury. But these days, as the law has developed, and as has become very clear, it is very difficult now to avoid the jury being told that they are entitled to draw the inference." (Bar/B13)

The provisions have been used to reflect the expectation that suspects should cooperate with their investigation and trial and that failure to do so, is indicative of guilt. Together with changes such as the credit given for early guilty pleas and plea before venues, the provisions have forced defences to be produced earlier:

> "The 'rabbit out of the hat' defence, which was so amusing and exciting, has gone… a lot of the fun has gone out of it now." (Stipe/C)

> "It has changed the whole way that everybody approaches cases... It makes them actually put forward a case from the word go." (Bar/B5)

Whilst in administrative terms this may be convenient, such an expectation inhibits the defence in testing the strength of the evidence of the police before deciding whether or not to answer questions. There is no corresponding requirement upon the police to disclose their case and, as noted in Chapter 4, the prosecution is entitled to change its case without censure.

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[48] Magistrates are now required to give reasons for their verdicts under the Human Rights Act 1998. My interviews pre-dated the implementation of Act but many of my respondents said that the significance of any inference is difficult to quantify. Other than in cases in which it is clear that an inference has brought a weak prosecution case up to the required standard of proof, or where no inference has been drawn, it will be difficult for a reviewing court to assess the impact of the defendant not testifying. The Crown Court will not interfere with magistrates' decisions about drawing inferences under s35 unless they are *Wednesbury* unreasonable (*CPS ex parte G and Others*, 1999).

5.6. Conclusion

The CJPOA provisions have reduced markedly the number of defendants who refuse to testify as well as those making no comment at the police station, as described in Chapter 3. The limited nature of the mischief that the provisions sought to address and their limited evidential application, however, means that they appear to have been decisive in only a limited number of cases:

> "In the great majority of cases in which an inference may be drawn it will ultimately be irrelevant to the issue of guilt or innocence." (Leng, 2001:110)

The complexity of the provisions and the amount of judicial time consumed by them for such little prosecutorial benefit has led to pragmatic calls for the repeal of the Act. In political terms, such a development appears unlikely. The decision in *Howell* (2002) suggests that the Court is reluctant to allow the provisions to be so restricted that they fall into desuetude. The provisions have been interpreted widely by the courts and have altered fundamentally the climate in which the accused is questioned and tried (Jackson *et al.*, 2000; Leng, 2001).

> "These provisions do seem to change the climate – as they were intended to – such that *in law*, the suspect is recruited as an active part of the investigation process." (Mirfield, 1995:616)

The Court of Appeal has described the police interview and trial as a "benign *continuum*" in which the suspect is engaged from the beginning (*Howell*, 2002); a characterisation few suspects are likely to recognise. The provisions have been interpreted boldly and in accordance with judicial notions of deserving and undeserving defendants. This judicial subjectivity has been criticised in its application to determining whether improperly obtained prosecution evidence should be excluded (Sharpe, 1998). The character of the defendant is considered in such cases in order to assess the effects of the breach of provisions on the suspect and the reliability of the evidence thereby obtained. To apply such judgments when considering whether evidential sanctions should be applied to the failure of the accused to cooperate, however, is to short-circuit the process of determining guilt. The expectation of cooperation is incompatible with principles of adversarialism, sits uneasily with the presumption of innocence and assists the prosecution in discharging the burden of proof.

The final chapter assesses what impact the separate and cumulative effects of the CJPOA and CPIA provisions have had upon to the criminal justice system in principle and practice and considers the lessons that can be drawn from these two Acts.

Conclusion

This critique of the introduction and implementation of ss34-37 CJPOA 1994 and Part 1 CPIA 1996 has sought to challenge the politically enduring metaphor of "re-balancing" a criminal justice system tipped too far in favour of the criminal. This thesis has considered, not only the direct effects of the Acts, but also their wider ramifications upon the fairness of the investigation and trial process, most significantly upon the solicitor/client relationship. It has considered how the implementation of these Acts has intersected with the occupational cultures of those responsible for their implementation. It draws upon the relevant literature, case law and the findings of my qualitative research with criminal justice practitioners in order to demonstrate how this re-balancing premise is flawed in both principle and practice. In addition, this study explores the ways in which, it is contended, these Acts have undermined fundamental principles of adversarial procedure, thus diminishing the fairness of criminal proceedings. The failure of legislators to consider the Acts in the broader context of an adversarial, common law system was a direct cause of many of the practical problems that have arisen as the Acts have been implemented. These provisions affect directly the principles recognised as intrinsic to a fair trial, namely: the privilege against self-incrimination, the presumption of innocence and the requirement that the prosecution discharge the burden of proof in determining guilt.

Chapter 1 charts the research, debates and development of the common law around these Acts, locating them within a historical and theoretical framework, in order to demonstrate why such measures were unnecessary and inappropriate in an adversarial system. It is argued that the notion of re-balancing, with its connotations of fairness and equity, has been deployed inappropriately by those seeking to restrict the rights of defendants. The Royal Commission on Criminal Procedure (1981) had recommended increased police powers as part of package against which the right of silence and other protections were a necessary countervailing force. It was, therefore, duplicitous to suggest that the protections accorded to the accused in order to achieve "equality of arms" with the prosecution should have to be balanced or paid for by the diminution of other rights. This consideration of the underlying principles demonstrated how it was similarly misleading to equate prosecution and defence disclosure, or convicting the guilty and acquitting the innocent. Whilst the formal burden of proof remains unchanged, these Acts are predicated upon the assumption that a suspect's failure to cooperate is indicative of guilt, and their quasi-inquisitorial expectations inhibit defence testing of the prosecution case. It is thus contended that these changes alter, not just the rules of evidence, but the very nature of the system.

The curtailment of the right of silence has been described as "one of the most controversial reforms of English criminal law in the last century" (Jennings *et al.*, 2000:879). The CJPOA marked a decisive change in the political climate, away from the concerns about preventing miscarriages of justice caused by the infamous cases of the early 1990s. These verdicts had delayed the curtailment of the right of silence and had led to the establishment of the Royal Commission on Criminal Justice (1993). The CJPOA heralded, and indeed facilitated, a succession of determinedly "crime control" measures that purported to rebalance the system against criminals. The case for both Acts was founded upon "common sense" rhetoric rather than reasoned analysis or research. The changes were offered as a panacea for emotive examples of dangerous criminals escaping justice, but the resulting legislation applied to all suspects. The CPIA was introduced without any appraisal of the effects of the CJPOA or consideration of how their respective provisions might interact. There was little evidence that the administration of justice was being compromised by suspects exercising their right of silence, either at the police station or at trial, by defence requests for unused material or by

ambush defences. Indeed, the lack of evidence supporting the introduction of the Acts has made it difficult to isolate their effects. Recent Court of Appeal decisions, however, illustrated the dangers of non-disclosure in causing unsafe convictions. There was also a wealth of research that demonstrated the inadequacy of the protections offered to suspects in police custody and the effects of the social, physical and personal context within which suspects decide whether or not to exercise their right of silence. In Chapter 1, I thus develop Greer's (1994) typologies to characterise the incentive behind the CJPOA as "Symbolic Abolitionism"; a legislative gesture made for political rather than practical effect. This attitude has come to pervade criminal justice policymaking. Following this challenge to a "'benchmark' of British justice" (Jackson, 1991:415), other tenets of due process, such as the right to elect trial by jury and the principle of double jeopardy, have become targets for policy makers in the pursuit of crime control.

Much has been written about the theoretical and evidential implications of the Acts, but hitherto, there has been relatively little evaluation of the effects of the changes in practice. Chapter 2 details the qualitative methods that were chosen to explore the impact of the Acts. As the Acts run counter to what was known about the working cultures of those involved, I analyse the influence of such occupational cultures on the implementation of the legislation and the changes that this has made to how the different groups work. I conducted a programme of 100 semi-structured interviews with criminal justice practitioners, received 100 questionnaires from police officers, and obtained statistical data relating to legal representation and no comment interviews. These focused upon one area, Region X, a large, predominantly urban, multi-racial area, outside London. Such a microcosm also enabled an exploration of the dynamics between the different groups.

The re-balancing argument was founded in the "Exchange Abolitionist" backlash against the increased protections accorded to suspects by PACE. Whilst PACE has wrought immeasurable improvements in the treatment of suspects, proponents of the changes assumed rather than evaluated the benefits of these rights. Chapter 3 draws upon the pre-existing data, together with my own research, to explore how the statutory provisions are mediated through "cop culture," the working practices of legal representatives and the abilities of suspects to avail themselves of their rights. This chapter contends that the police were not unduly handicapped by the pre-existing regime, whereas many suspects were insufficiently protected. It is argued that the flawed assumptions underlying the Act, together with persisting deficiencies in the delivery of the PACE safeguards, have left those detained in police custody unfairly disadvantaged by the changes.

As acknowledged above, whilst the requirements of PACE have led to improvements in police behaviours and attitudes, officers were able to circumvent or minimise the effectiveness of many of the protections offered to suspects. The police tend to resent any challenge to their authority or impediment to the achievement of 'results'; the right of silence and legal representatives were regarded by many as both. The CJPOA appears to reinforce the expectations of compliance and 'appropriate' behaviour from suspects that PACE was intended to address. The CJPOA seems to have reduced the combativeness of interviews as many officers feel they no longer 'need' to obtain a confession; either a suspect confesses, or inferences may be drawn from a no comment interview. It is argued that that the potential for increasing the pressure on suspects to confess, now derives from the law rather than police impropriety.

Whilst PACE makes provisions for particularly vulnerable suspects, many suspects in custody are needy in some way (most are of below average intelligence and under the influence of drugs or alcohol). Legal representatives reported how difficult it is for suspects to make no comment, even when an adviser is present. The revised caution, necessitated by the CJPOA, was regarded by most as unduly complex. The majority of respondents interviewed for this research thought that, even following an explanation, few suspects, particularly the young and

first time suspects, understand it. The caution is perceived by many suspects as coercive and both this and the 'special warnings' enable interviewing officers to put suspects under more pressure to answer questions, either through repetition or through the manner in which they explain them.

It appears that the direct effects of the Act have been limited by the relatively small numbers of suspects making no comment hitherto. It is unclear whether or not the provisions have reduced the number of no comment interviews. Bucke *et al.* (2000) reported a sharp decline, whereas Bridges and Choongh (1998) found that the rate had remained stable. In this study, half of police officers thought that there had been a decline; 40% of legal representatives thought that they advised silence less now. This may, of course, depend upon their previous practice as a cadre of legal representatives never advised no comment interviews before the CJPOA; a proportion that has increased subsequently. This has not necessarily altered the outcome of interviews; the confession and charge rates have remained stable (Bucke *et al.* 2000). The data for this study showed no link between rates of legal advice and no comment interviews, although most who made no comment were legally advised.

These findings provide empirical support for the argument of commentators such as Cape (1997; 2003) who contend that the greatest impact of the CJPOA has been upon the nature of legal representation. The suggestion that the presence of a solicitor gave suspects an unfair advantage over the police, or even put them on "equal terms" was demonstrably flawed (McConville *et al.,* 1994). Whilst rates of legal advice have increased steadily, still only a minority of suspects is represented and the quality of much of that representation was, and remains, poor. The work is frequently delegated to non-solicitors, many of whom are retired police officers. Although this research suggests that the police are becoming more accepting of legal representatives, a significant minority of officers continues to be very hostile to their presence. The lack of adversarialism of legal representatives is due in part to their lack of formal authority to enforce their clients' rights. Many legal representatives take the utilitarian view that cultivating good relationships with the police is more important than the interests of individual clients. The refusal to answer police questions is effectively the only sanction available to the accused, and this now has evidential risks. Whilst the courts have expressed an expectation that suspects will cooperate with the police, there is no reciprocal obligation for the police to disclose their case to the defence before interview. Without this, there can be no balance between the parties in interview. Some officers initially made more disclosure after the CJPOA in order to avoid silent suspects having any 'get out' at court, but this appears to be reverting as the courts have made it clear that they do not regard non-disclosure as a legitimate reason for avoiding inferences.

This study contends that the CJPOA has made advising more complex. Solicitors now have to consider, not how strong the police case is (which they may not know if the interviewing officer will not disclose it), but how strong it might be should the case come to trial. They must also judge whether answering questions will provide the police with sufficient evidence to charge. The potential evidential significance of legal advice has introduced a tension into the solicitor/client relationship, causing many legal representatives to adopt a defensive posture, rather than acting solely in the interests of their clients. By limiting its protective function and tainting the professional relationship in this manner, the CJPOA has undermined the safeguard of legal advice, a fundamental requirement of a fair trial, in such a way as to be almost immune from formal challenge under the human rights legislation.

Although the CPIA was initially a secondary part of this project and has generated little case law, it has caused greater concern as a potential direct cause of injustice than the CJPOA (BAFS/CBA, 1999; CPSI, 2000; Plotnikoff and Woolfson, 2001). The disclosure regime runs counter to the adversarial nature and prevailing working cultures within the system. Its provisions cannot be made to work because of this tension and the lack of confidence that participants have in them. No system can thwart determined malfeasance, but the CPIA has

formalised the potential for abuse and increased the likelihood of errors occurring. It lacks procedural safeguards, (the informal system of disclosure that counsel have resorted to in the interests of fairness is disapproved of in the *Attorney General's Guidelines*). It is reliant instead upon the intuition of prosecutors and the defence to notice what might be missing from the schedules.

The complex and bureaucratic requirements of the Act have created inappropriate divisions of responsibility that have caused confusion and responsibility vacuums, and ignore the generally linear progression of cases through the system. The subjective nature of the provisions means that there is great variation in their implementation according to the temperament and workload of the police and Crown Prosecutors. The onerous administrative pressure they impose has led to the routinisation and delegation of work to support staff by both sides. The CPIA requires the traditionally adversarial police to fulfil an inquisitorial function; prosecutors to consider material from the perspective of the defence; and the defence to act in the, often contradictory, interests of the administration of the system as well as those of their clients. Defence solicitors are also reliant upon the co-operation of their clients to submit the statement within a very short period of time. Although the Court is limited in the sanctions it can apply should they fail to do so, this does appear to have led many solicitors to begin their case preparation earlier. The CPIA has neither resulted in financial savings to the courts, nor speeded up the disposal of cases. Encouraging police and prosecutors to think in terms of withholding material runs counter to the lessons that had appeared to have been drawn from the miscarriages of justice that led to the RCCJ (1993).

The "inquisitorial" elements of the CPIA regime are predicated upon a degree of trust between the parties that these findings suggest is unrealistic and is itself undermined by the provisions. Secondary disclosure effectively broke down due to the alien expectations of the Act. Whilst this research suggests that the requirements of the Act have improved officers' awareness of their responsibilities, many do not understand the provisions or their importance. The police consider that attempts to encourage them to be objective and fair are undermined by the partisan conduct of defence teams (Phillips, 2001) and many mistrust the CPS. The task of compiling the schedules is of vital importance but the role of disclosure officer is ill-defined and unpopular. It is argued that material should not be filtered at this early stage, and it should be for a defence solicitor to identify material that is of potential relevance. Prosecutors complain that schedules are incomplete or incomprehensible, they do not receive material, disclosure officers are difficult to contact and defence statements are cursory. Whilst defence statements tend to be regarded by both sides as merely a formality, some defendants have been compromised at trial by what has been written. This has led the Courts to suggest, and many solicitors to insist, that defence statements are signed; another sign that solicitors are protecting their own position before that of their clients'. This is a further encroachment upon the ability of the defence to put the prosecution to proof and to adapt its case in response to changes by the prosecution.

This thesis contends that making prosecution disclosure contingent upon defence disclosure and using (potential) evidence as a sanction, alters fundamentally the pre-trial balance of information. It puts a further quasi-inquisitorial burden upon the defence, increasing the pressure on suspects to cooperate with proceedings against them. The greatest danger with the disclosure provisions lies where the prosecution either does not know that material exists or does not appreciate the significance of it; or where the defence does not know that potentially relevant evidence exists. Barristers were almost unanimous in their condemnation of the regime and the potential for injustices that they have seen; solicitors were less concerned. The nature of the provisions means that they can be, as they are unlikely to be troubled by hidden unused material unless they seek it out actively. I was told of numerous examples of significant material that had been discovered, often by chance, very late in proceedings. Such cases are likely to be merely the tip of an iceberg of potential miscarriages

of justice. It is argued that the CPIA has increased the potential for injustice whilst making it less likely that exculpatory evidence will be uncovered to expose any wrongful convictions.

The 'silence' provisions of the CJPOA rapidly generated a body of domestic case law of disproportionate weight to their 'evidential' value (Birch 1999). Whilst the provisions appear to have been decisive in only a limited number of cases and have not made a noticeable difference in terms of increasing charge, plea or conviction rates, they have had much wider symbolic and practical ramifications. They have altered fundamentally the climate in which the accused is questioned and tried (Jackson *et al.*, 2000; Leng, 2001). The Act hinders the adversarial preparation of the defence and testing of the police case. It has given the police further inquisitorial powers, evidence from which may then be deployed in adversarial proceedings (Cape, 2003:369). Calls for the repeal of the CJPOA have also been made on the pragmatic grounds that its minimal value to prosecutors is outweighed by the costs of lengthier legal consultations at the police station, the burdens imposed upon jurors, the judicial time consumed, and the unnecessary and otherwise unmeritorious appeals that have resulted. ("A rational system of evidence would be planning the obsequies of section 34" (Birch, 1999:769)). Such a development appears unlikely in political terms, and the Courts appear reluctant to limit the provisions.

Contrary to the expectations of many commentators, the CJPOA has been declared not to breach Article 6 *per se* (*Condron* v *UK,* 2001). Whilst the Strasbourg decisions have had a restrictive effect upon the interpretation of the Act, the equivocation of the ECtHR permitted the domestic courts to widen the parameters of permissible inferences and to narrow the grounds upon which mis-directions will result in convictions being quashed (*Francom,* 2000; *Everson*, 2001; *Chenia*, 2002). The drawing of inferences has been delegated almost entirely to jurors. The provisions have been interpreted boldly and in accordance with judicial notions of deserving and undeserving defendants. Different standards have been applied to the prosecution and defence, almost all in favour of the prosecution: whilst adverse inferences are permissible, speculation as to innocent reasons for a defendant not testifying is not. Inferences may be drawn if silence in interview can be attributed to the suspect having no answer that would stand up to cross-examination (*Condron*, 1997), yet the police are not expected to provide their complete case at this stage. This study contends that such decisions represent a further 'tipping of the balance' against suspects.

Whilst no central statistics are kept on the number of defendants who do not testify, it appears that the CJPOA has reduced this markedly (Bucke *et al.*, 2000). The effects of this appear to have been limited, however. Some of those interviewed, thought that the provisions had not made a significant difference as magistrates and jurors had always drawn inferences against defendants who did not give evidence, as some magistrates admitted readily. Amongst my respondents, the testing of s34 in court was relatively rare. Section 34 inferences are no longer restricted to subsequent fabrication (*Condron*, 1997) but can now be used, in effect if not explicitly, to punish defendants for not co-operating with the police at the earliest opportunity. The Court of Appeal has defined the police interview and trial as a "benign *continuum*" in which the suspect is engaged from the beginning (*Howell*, 2002). This is unfair, because police interviews lack the safeguards or the rules of natural justice that attend a fair trial (Jackson, 2001:147; Leng, 2001). The protections afforded at trial before inferences can be left to the jury, such as the requirement that a *prima facie* case must first have been established, are of limited value, as they do not apply when the suspects make their decisions at the police station.

The ECtHR has acknowledged that the provisions place the accused in a "fundamental dilemma" (*Murray* v *UK*, 1996 at p 60). It is submitted that the expectation of co-operation is incompatible with principles of adversarialism. It sits uneasily with the presumption of innocence, in some cases assisting the Crown in discharging the burden of proof and it hinders the testing of the police case by the defence. The provisions have effectively

extended police powers to question suspects in circumstances in which they have sufficient evidence to establish a *prima facie* case (this was confirmed in the latest PACE Codes of Practice).

This thesis contends that there is an irreconcilable tension between s58 PACE, which provides the right to legal advice at the police station and s34 CJPOA. As described above, the risk of invoking inferences undermines the bargaining power of legal representatives to ensure the fair and legal treatment of suspects at the police station. It appears that the Court considers that the role of the adviser should be merely to facilitate the expeditious processing of their clients. Legal advice relating to the presumption of innocence or putting the prosecution to proof is considered tactical or 'bad' advice rather than a proper response in an adversarial context. Whether the Court considers a reason for remaining silent to be good may well accord with whether or not the defendant is considered 'deserving' or innocent. There is even less evidential value in speculating why a client accepted legal advice than in inferring guilt from silence. Asking jurors to add another tier of speculation to their assessment of the evidence risks multiplying the negative effects of silence and 'short-circuits' the deductive reasoning that leads from silence to guilt. If the solicitor has to testify, this is likely to attract a disproportionate amount of the jury's attention compared to its evidential value (Birch, 1999:786).

These Acts have had significant effects in a minority of cases. Of itself, this is a cause for concern. The real lessons of the Acts, however, come from their indirect effects and their impact upon legislating in this area. Whilst criminal justice policymaking is, by its nature, an inherently political process, (Newburn, 1995; Garland, 2001), these measures were distinguished by a disregard for research about the extent of the 'problems', the occupational cultures of those working within the system, the fundamental principles of the criminal justice system and the fairness of the trial process. They demonstrate the dangers of an *ad hoc*, unresearched and atheoretical approach to criminal justice making. The furore that accompanied the enactment of the CJPOA abated relatively quickly. The issue no longer appears to arouse much critical interest amongst practitioners, although judgments such as *Howell,* (2002) have provoked renewed expressions of concern about the effects of the CJPOA upon adversarial justice (Cape, 2003). Whilst the current political climate appears inauspicious as regards the introduction or reinstatement of measures to strengthen the position of suspects, subjecting these Acts to detailed scrutiny may inform the wider debate about such 'crime control' policy making.

The CJPOA has proved to be a dangerous precedent. It drove the CPIA and subsequent proposals that encroach further upon the rights of suspects. These changes have not satiated the clamour for ever greater restrictions upon the rights of suspects. If anything, they have fuelled the momentum for further statutory encroachments upon the rights of the accused; the police continue to protest that the disclosure regime is insufficiently robust (Phillips, 2001). In the face of the continued need of governments to be seen to be tackling crime, subsequent gestures have to be bolder. Each of these developments facilitates further 'common sense' incursions upon the rights of suspects and pushes further the boundaries of what is acceptable. Previously fundamental principles are either eroded gradually, or become targets in the pursuit of crime control.

It is argued that these Acts merit close attention as they go beyond mere procedural change and have had a distorting effect upon the adversarial character of the criminal justice system. They have created an unprecedented expectation that, from interview to trial, suspects will cooperate actively in facilitating the expeditious progress of proceedings. Failure to do so is considered indicative of guilt. These quasi-inquisitorial expectations apply only to the suspect, not to the police. Any response (or lack thereof) by the suspect, may be adduced by the prosecution in adversarial trial proceedings. It is argued that this has the effect of encroaching upon the privilege against self-incrimination, undermining the presumption of

innocence and easing the burden of proof. It has inhibited the ability of the defence to test the case for the prosecution both at the police station and at trial and, as described above, has undermined the benefits of legal advice. Leng described the disclosure proposals, as they then were, as "losing sight of the defendant" (1995). On the contrary, both the CPIA and the CJPOA focus attention on the defendant as never before.

Much of the crime control debate has been framed in terms of "re-balancing" the system between the competing rights of the defendant and the powers of the police and prosecution. This implies a precision in the weighing of the rights of the defence against the powers of the prosecution and an evaluation of where the balance should be struck, that has been largely absent from the debate. The right to legal advice appears to have been weighed repeatedly against further incursions upon the rights of suspects. Issues such as prosecution and defence disclosure were fallaciously given equivalence when they have separate rationales, impose distinct responsibilities and raise different concerns. Such arguments ignore the due process rationale for the statutory and evidential protections given to suspects and disregard the asymmetry required in an adversarial system in order to achieve "equality of arms" between the accused and the prosecution. The protections of PACE have been of undoubted benefit to suspects but they fulfil different purposes to the right of silence and should not be regarded as a substitute for it. Such claims fail also to consider the protections actually received by suspects, most significantly, the nature and quality of legal representation at the police station. Rather than "re-balancing," the process may be more appropriately characterised as a series of crude "trade-offs" which have compromised the fundamental rights of the defendant, distorted the adversarial framework of criminal justice and vitiated the fairness of proceedings.

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Annex A: Tables

Table 1: Incidence of Suspects Exercising their Right of Silence at the Police Station

Author	Sample	Incidence of Silence
Zander (1979)	282 Old Bailey cases	4% silent (75% of these were convicted)
Baldwin & McConville (1980)	1000 Birmingham Crown Court. 476 London Crown Courts	3.8% in Birmingham 6.5% in London
Mitchell (1983)	400 Worcester Crown Court	4.3%
McKenzie and Irving (1988)	68 police interviews (1986) 68 police interviews (1987) 100 files	11% (1986), 15% (1987) 16% silent to some / all questions
Sanders *et al.* (1989)	527 police interviews	2.4% - complete no comment. 5.3% - flat denial, no explanation.
Metropolitan Police Study for HOWG (1989)	1,558 police interviews	23% overall no comment (6% complete no comment, 6% to questions relevant to offence, 11% to some relevant questions). 42.6% of legally represented made no comment (15.7%, 11.5% and 15.4%)
West Yorkshire Police Study for HOWG (1989)	3,095 interviews	12.3% overall no comment (2.3% complete no comment, 2.8% to relevant questions; 7.3% to some relevant questions). 23% legally represented suspects no comment (5%, 5% and 13%)
Moston, Williamson & Stevenson (1992)	1067 CID interviews	8% complete no comment 8% refused some questions
Baldwin (1992)	600 police interviews (West Midlands, West Mercia, Met.) + 400 video interviews	1.7% complete no comment 18% refused some questions
ACPO (1993)	3,600 over 8 forces (no methodology published)	22% silent to some or all questions 10% complete no comment 57% of those making no comment were legally advised 47% of those with 5+ convictions made no comment
McConville & Hodgson (1993)	180 police interviews with legal adviser present	2.5% complete no comment 27% refused some questions
Leng (1993)	848 police interviews	4.5% (5% adults, 3.3% juveniles). 1.3% silence not maintained.

Table 2: Summaries of Tape Recorded Police Interviews with Suspects Transcribed in Region X between Monday 14 June and Sunday 25 July 1999.

OCU / %	A1	A2	B1	C1	C2	C3	D1	D2	E1	E2	F1	F2	G1	H1	H2	H3	H4	J1	Mean
Overall legally represented	50.3	43.9	66.5	49.0	66.7	49.2	53.1	45.8	51.0	51.7	54.7	54.8	72.4	82.4	71.9	62.9	62.0	57.0	58.1
Overall no comment	8.7	3.3	15.1	2.6	4.2	7.2	3.7	1.2	4.6	3.4	2.6	7.9	3.7	11.8	10.9	4.3	7.6	8.3	6.2
No comment - represented	6.8	3.3	11.9	1.3	0.0	6.3	3.7	1.2	4.1	3.4	1.7	7.3	3.0	5.9	7.8	4.3	7.6	6.6	4.8
No comment - unrepresented	1.9	0.0	3.2	1.3	4.2	0.9	0.0	0.0	0.5	0.0	0.9	0.6	0.7	5.9	3.1	0.0	0.0	1.7	1.4
Comment - represented	43.5	40.6	54.6	47.7	66.7	42.9	49.4	44.6	46.9	48.3	53.0	47.5	69.0	76.5	64.1	58.6	54.4	50.4	53.3
Comment- un represented	47.8	56.1	30.3	49.7	29.2	50.0	46.9	54.2	48.5	48.3	44.4	44.6	26.9	11.8	25.0	37.1	38.0	41.3	40.6
Total no. of interviews	207	239	185	155	48	112	81	83	196	149	117	177	134	17	64	70	79	121	2234

Table 3: Summary of the Changes in the exercise of the Right of Silence (Compiled from Bucke *et al.*, 2000).

Study			Complete no comment		Selective no comment		Total Some/all no comment	
			%	% Change	%	% Change	%	% Change
Area	Metropolitan Police	1998	20	- 50	12	- 8	32	- 34.4
		2000	10		11		21	
	Other forces	1998	7	- 28.6	14	- 35.7	21	- 33.3
		2000	5		9		14	
Legal Advice	Represented	1998	20	- 35	19	- 52.63	39	- 43.6
		2000	13		9		22	
	Unrepresented	1998	3	- 33	9	- 33.3	12	- 33.3
		2000	2		6		8	
Ethnicity	White	1998	8	- 37.5	14	-35.7	22	- 36.4
		2000	5		9		14	
	Asian	1998	13	- 53.8	8	0	21	- 33.3
		2000	6		8		14	
	Black	1998	21	- 66.7	13	- 7.7	34	- 44.1
		2000	7		12		19	
Overall no comment		1998	10	- 40	13	- 23.1	23	- 30.4
		2000	6		10		16	

Table 4 -Change in Use of the Order as a Live Issue at Trial (1990-1995)

		Article 3	Article 4	Article 5	Article 6
Scheduled	1990	11%	59%	16%	11%
	1995	11%	26%	10 %	21%
Non-scheduled	1990	4%	13%	0	<1%
	1995	1%	3%	0	0

Annex B: ss. 34-38 Criminal Justice and Public Order Act 1994

Inferences from accused's silence

34. Effect of accused's failure to mention facts when questioned or charged.

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies—

(a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under—

(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure as appear proper.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above "officially informed" means informed by a constable or any such person.

(5) This section does not—

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.

(7) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application for dismissal was a reference to the committal of the accused for trial.

35. Effect of accused's silence at trial.

(1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless—

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—

(a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

(6) Where the age of any person is material for the purposes of subsection (1) above, his age shall for those purposes be taken to be that which appears to the court to be his age.

(7) This section applies—

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;

(b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

36. Effect of accused's failure or refusal to account for objects, substances or marks.

(1) Where—

(a) a person is arrested by a constable, and there is—

(i) on his person; or

(ii) in or on his clothing or footwear; or

(iii) otherwise in his possession; or

(iv) in any place in which he is at the time of his arrest,

any object, substance or mark, or there is any mark on any such object; and

(b) that or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and

(c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies—

(a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under—

(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) above apply to the condition of clothing or footwear as they apply to a substance or mark thereon.

(4) Subsections (1) and (2) above do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

(5) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(6) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

(7) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

(8) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application for dismissal was a reference to the committal of the accused for trial.

37. Effect of accused's failure or refusal to account for presence at a particular place.

(1) Where—

(a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and

(b) that or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and

(c) the constable informs the person that he so believes, and requests him to account for that presence; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies—

(a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the Magistrates' Courts Act 1980 (application for dismissal

of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under—

(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

(4) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(5) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

(7) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application for dismissal was a reference to the committal of the accused for trial.

38. Interpretation and savings for sections 34, 35, 36 and 37.

(1) In sections 34, 35, 36 and 37 of this Act—

"legal representative" means an authorised advocate or authorised litigator, as defined by section 119(1) of the Courts and Legal Services Act 1990; and

"place" includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever.

(2) In sections 34(2), 35(3), 36(2) and 37(2), references to an offence charged include references to any other offence of which the accused could lawfully be convicted on that charge.

(3) A person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).

(4) A judge shall not refuse to grant such an application as is mentioned in section 34(2)(b), 36(2)(b) and 37(2)(b) solely on an inference drawn from such a failure as is mentioned in section 34(2), 36(2) or 37(2).

(5) Nothing in sections 34, 35, 36 or 37 prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).

In this subsection, the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(6) Nothing in sections 34, 35, 36 or 37 prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion.

Annex C: Part I Criminal Procedure and Investigations Act 1996

PART I DISCLOSURE

Introduction

1. Application of this Part. –
(1) This Part applies where-
(a) a person is charged with a summary offence in respect of which a court proceeds to summary trial and in respect of which he pleads not guilty,
(b) a person who has attained the age of 18 is charged with an offence which is triable either way, in respect of which a court proceeds to summary trial and in respect of which he pleads not guilty, or
(c) a person under the age of 18 is charged with an indictable offence in respect of which a court proceeds to summary trial and in respect of which he pleads not guilty.

(2) This Part also applies where-
(a) a person is charged with an indictable offence and he is committed for trial for the offence concerned,
(b) a person is charged with an indictable offence and proceedings for the trial of the person on the charge concerned are transferred to the Crown Court by virtue of a notice of transfer given under section 4 of the Criminal Justice Act 1987 (serious or complex fraud),
(c) a person is charged with an indictable offence and proceedings for the trial of the person on the charge concerned are transferred to the Crown Court by virtue of a notice of transfer served on a magistrates' court under section 53 of the Criminal Justice Act 1991 (certain cases involving children),
(d) a count charging a person with a summary offence is included in an indictment under the authority of section 40 of the Criminal Justice Act 1988 (common assault etc.), or
(e) a bill of indictment charging a person with an indictable offence is preferred under the authority of section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 (bill preferred by direction of Court of Appeal, or by direction or with consent of a judge).

(3) This Part applies in relation to alleged offences into which no criminal investigation has begun before the appointed day.

(4) For the purposes of this section a criminal investigation is an investigation which police officers or other persons have a duty to conduct with a view to it being ascertained-
(a) whether a person should be charged with an offence, or
(b) whether a person charged with an offence is guilty of it.

(5) The reference in subsection (3) to the appointed day is to such day as is appointed for the purposes of this Part by the Secretary of State by order.

2. - General interpretation.
(1) References to the accused are to the person mentioned in section 1(1) or (2).

(2) Where there is more than one accused in any proceedings this Part applies separately in relation to each of the accused.

(3) References to the prosecutor are to any person acting as prosecutor, whether an individual or a body.

(4) References to material are to material of all kinds, and in particular include references to-
(a) information, and
(b) objects of all descriptions.

(5) References to recording information are to putting it in a durable or retrievable form (such as writing or tape).

(6) This section applies for the purposes of this Part.

The main provisions

3. - Primary disclosure by prosecutor.

(1) The prosecutor must-
(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused, or
(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

(2) For the purposes of this section prosecution material is material-
(a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or
(b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused.

(3) Where material consists of information which has been recorded in any form the prosecutor discloses it for the purposes of this section-
(a) by securing that a copy is made of it and that the copy is given to the accused, or
(b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;
and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded.

(4) Where material consists of information which has not been recorded the prosecutor discloses it for the purposes of this section by securing that it is recorded in such form as he thinks fit and-
(a) by securing that a copy is made of it and that the copy is given to the accused, or
(b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so.

(5) Where material does not consist of information the prosecutor discloses it for the purposes of this section by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so.

(6) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

(7) Material must not be disclosed under this section to the extent that-
(a) it has been intercepted in obedience to a warrant issued under section 2 of the Interception of Communications Act 1985, or
(b) it indicates that such a warrant has been issued or that material has been intercepted in obedience to such a warrant.

(8) The prosecutor must act under this section during the period which, by virtue of section 12, is the relevant period for this section.

4. - Primary disclosure: further provisions.

(1) This section applies where-

(a) the prosecutor acts under section 3, and

(b) before so doing he was given a document in pursuance of provision included, by virtue of section 24(3), in a code operative under Part II.

(2) In such a case the prosecutor must give the document to the accused at the same time as the prosecutor acts under section 3.

5. - Compulsory disclosure by accused.

(1) Subject to subsections (2) to (4), this section applies where-

(a) this Part applies by virtue of section 1(2), and

(b) the prosecutor complies with section 3 or purports to comply with it.

(2) Where this Part applies by virtue of section 1(2)(b), this section does not apply unless-

(a) a copy of the notice of transfer, and

(b) copies of the documents containing the evidence,

have been given to the accused under regulations made under section 5(9) of the Criminal Justice Act 1987.

(3) Where this Part applies by virtue of section 1(2)(c), this section does not apply unless-

(a) a copy of the notice of transfer, and

(b) copies of the documents containing the evidence,

have been given to the accused under regulations made under paragraph 4 of Schedule 6 to the Criminal Justice Act 1991.

(4) Where this Part applies by virtue of section 1(2)(e), this section does not apply unless the prosecutor has served on the accused a copy of the indictment and a copy of the set of documents containing the evidence which is the basis of the charge.

(5) Where this section applies, the accused must give a defence statement to the court and the prosecutor.

(6) For the purposes of this section a defence statement is a written statement-

(a) setting out in general terms the nature of the accused's defence,

(b) indicating the matters on which he takes issue with the prosecution, and

(c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

(7) If the defence statement discloses an alibi the accused must give particulars of the alibi in the statement, including-

(a) the name and address of any witness the accused believes is able to give evidence in support of the alibi, if the name and address are known to the accused when the statement is given;

(b) any information in the accused's possession which might be of material assistance in finding any such witness, if his name or address is not known to the accused when the statement is given.

(8) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

(9) The accused must give a defence statement under this section during the period which, by virtue of section 12, is the relevant period for this section.

6. - Voluntary disclosure by accused.

(1) This section applies where-

(a) this Part applies by virtue of section 1(1), and

(b) the prosecutor complies with section 3 or purports to comply with it.

(2) The accused-

(a) may give a defence statement to the prosecutor, and

(b) if he does so, must also give such a statement to the court.

(3) Subsections (6) to (8) of section 5 apply for the purposes of this section as they apply for the purposes of that.

(4) If the accused gives a defence statement under this section he must give it during the period which, by virtue of section 12, is the relevant period for this section.

7. - Secondary disclosure by prosecutor.

(1) This section applies where the accused gives a defence statement under section 5 or 6.

(2) The prosecutor must-

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

(3) For the purposes of this section prosecution material is material-

(a) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused, or

(b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused.

(4) Subsections (3) to (5) of section 3 (method by which prosecutor discloses) apply for the purposes of this section as they apply for the purposes of that.

(5) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

(6) Material must not be disclosed under this section to the extent that-

(a) it has been intercepted in obedience to a warrant issued under section 2 of the Interception of Communications Act 1985, or

(b) it indicates that such a warrant has been issued or that material has been intercepted in obedience to such a warrant.

(7) The prosecutor must act under this section during the period which, by virtue of section 12, is the relevant period for this section.

8. Application by accused for disclosure.-

(1) This section applies where the accused gives a defence statement under section 5 or 6 and the prosecutor complies with section 7 or purports to comply with it or fails to comply with it.

(2) If the accused has at any time reasonable cause to believe that-

(a) there is prosecution material which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, and
(b) the material has not been disclosed to the accused,
the accused may apply to the court for an order requiring the prosecutor to disclose such material to the accused.

(3) For the purposes of this section prosecution material is material-
(a) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused,
(b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused, or
(c) which falls within subsection (4).

(4) Material falls within this subsection if in pursuance of a code operative under Part II the prosecutor must, if he asks for the material, be given a copy of it or be allowed to inspect it in connection with the case for the prosecution against the accused.

(5) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

(6) Material must not be disclosed under this section to the extent that-
(a) it has been intercepted in obedience to a warrant issued under section 2 of the Interception of Communications Act 1985, or
(b) it indicates that such a warrant has been issued or that material has been intercepted in obedience to such a warrant.

9. - Continuing duty of prosecutor to disclose.
(1) Subsection (2) applies at all times-
(a) after the prosecutor complies with section 3 or purports to comply with it, and
(b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.

(2) The prosecutor must keep under review the question whether at any given time there is prosecution material which-
(a) in his opinion might undermine the case for the prosecution against the accused, and
(b) has not been disclosed to the accused;
and if there is such material at any time the prosecutor must disclose it to the accused as soon as is reasonably practicable.

(3) In applying subsection (2) by reference to any given time the state of affairs at that time (including the case for the prosecution as it stands at that time) must be taken into account.

(4) Subsection (5) applies at all times-
(a) after the prosecutor complies with section 7 or purports to comply with it, and
(b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.

(5) The prosecutor must keep under review the question whether at any given time there is prosecution material which-
(a) might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, and
(b) has not been disclosed to the accused;
and if there is such material at any time the prosecutor must disclose it to the accused as soon as is reasonably practicable.

(6) For the purposes of this section prosecution material is material-
(a) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused, or
(b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused.

(7) Subsections (3) to (5) of section 3 (method by which prosecutor discloses) apply for the purposes of this section as they apply for the purposes of that.

(8) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

(9) Material must not be disclosed under this section to the extent that-
(a) it has been intercepted in obedience to a warrant issued under section 2 of the Interception of Communications Act 1985, or
(b) it indicates that such a warrant has been issued or that material has been intercepted in obedience to such a warrant.

10. - Prosecutor's failure to observe time limits.
(1) This section applies if the prosecutor-
(a) purports to act under section 3 after the end of the period which, by virtue of section 12, is the relevant period for section 3, or
(b) purports to act under section 7 after the end of the period which, by virtue of section 12, is the relevant period for section 7.

(2) Subject to subsection (3), the failure to act during the period concerned does not on its own constitute grounds for staying the proceedings for abuse of process.

(3) Subsection (2) does not prevent the failure constituting such grounds if it involves such delay by the prosecutor that the accused is denied a fair trial.

11. Faults in disclosure by accused.-
(1) This section applies where section 5 applies and the accused-
(a) fails to give a defence statement under that section,
(b) gives a defence statement under that section but does so after the end of the period which, by virtue of section 12, is the relevant period for section 5,
(c) sets out inconsistent defences in a defence statement given under section 5,
(d) at his trial puts forward a defence which is different from any defence set out in a defence statement given under section 5,
(e) at his trial adduces evidence in support of an alibi without having given particulars of the alibi in a defence statement given under section 5, or
(f) at his trial calls a witness to give evidence in support of an alibi without having complied with subsection (7)(a) or (b) of section 5 as regards the witness in giving a defence statement under that section.

(2) This section also applies where section 6 applies, the accused gives a defence statement under that section, and the accused-
(a) gives the statement after the end of the period which, by virtue of section 12, is the relevant period for section 6,
(b) sets out inconsistent defences in the statement,
(c) at his trial puts forward a defence which is different from any defence set out in the statement,
(d) at his trial adduces evidence in support of an alibi without having given particulars of the alibi in the statement, or

(e) at his trial calls a witness to give evidence in support of an alibi without having complied with subsection (7)(a) or (b) of section 5 (as applied by section 6) as regards the witness in giving the statement.

(3) Where this section applies-
(a) the court or, with the leave of the court, any other party may make such comment as appears appropriate;
(b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.

(4) Where the accused puts forward a defence which is different from any defence set out in a defence statement given under section 5 or 6, in doing anything under subsection (3) or in deciding whether to do anything under it the court shall have regard-
(a) to the extent of the difference in the defences, and
(b) to whether there is any justification for it.

(5) A person shall not be convicted of an offence solely on an inference drawn under subsection (3).

(6) Any reference in this section to evidence in support of an alibi shall be construed in accordance with section 5.

Time limits

12. - Time limits.

(1) This section has effect for the purpose of determining the relevant period for sections 3, 5, 6 and 7.

(2) Subject to subsection (3), the relevant period is a period beginning and ending with such days as the Secretary of State prescribes by regulations for the purposes of the section concerned.

(3) The regulations may do one or more of the following-
(a) provide that the relevant period for any section shall if the court so orders be extended (or further extended) by so many days as the court specifies;
(b) provide that the court may only make such an order if an application is made by a prescribed person and if any other prescribed conditions are fulfilled;
(c) provide that an application may only be made if prescribed conditions are fulfilled;
(d) provide that the number of days by which a period may be extended shall be entirely at the court's discretion;
(e) provide that the number of days by which a period may be extended shall not exceed a prescribed number;
(f) provide that there shall be no limit on the number of applications that may be made to extend a period;
(g) provide that no more than a prescribed number of applications may be made to extend a period;
and references to the relevant period for a section shall be construed accordingly.

(4) Conditions mentioned in subsection (3) may be framed by reference to such factors as the Secretary of State thinks fit.

(5) Without prejudice to the generality of subsection (4), so far as the relevant period for section 3 or 7 is concerned-
(a) conditions may be framed by reference to the nature or volume of the material concerned;

(b) the nature of material may be defined by reference to the prosecutor's belief that the question of non-disclosure on grounds of public interest may arise.

(6) In subsection (3) "prescribed" means prescribed by regulations under this section.

13. - Time limits: transitional.

(1) As regards a case in relation to which no regulations under section 12 have come into force for the purposes of section 3, section 3(8) shall have effect as if it read- "(8) The prosecutor must act under this section as soon as is reasonably practicable after-

(a) the accused pleads not guilty (where this Part applies by virtue of section 1(1)),

(b) the accused is committed for trial (where this Part applies by virtue of section 1(2)(a)), (c) the proceedings are transferred (where this Part applies by virtue of section 1(2)(b) or (c)), (d) the count is included in the indictment (where this Part applies by virtue of section 1(2)(d)), or

(e) the bill of indictment is preferred (where this Part applies by virtue of section 1(2)(e))."

(2) As regards a case in relation to which no regulations under section 12 have come into force for the purposes of section 7, section 7(7) shall have effect as if it read- "(7) The prosecutor must act under this section as soon as is reasonably practicable after the accused gives a defence statement under section 5 or 6."

Public interest

14. Public interest: review for summary trials. –

(1) This section applies where this Part applies by virtue of section 1(1).

(2) At any time-

(a) after a court makes an order under section 3(6), 7(5), 8(5) or 9(8), and

(b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned,

the accused may apply to the court for a review of the question whether it is still not in the public interest to disclose material affected by its order.

(3) In such a case the court must review that question, and if it concludes that it is in the public interest to disclose material to any extent-

(a) it shall so order, and

(b) it shall take such steps as are reasonable to inform the prosecutor of its order.

(4) Where the prosecutor is informed of an order made under subsection (3) he must act accordingly having regard to the provisions of this Part (unless he decides not to proceed with the case concerned).

15. - Public interest: review in other cases.

(1) This section applies where this Part applies by virtue of section 1(2).

(2) This section applies at all times-

(a) after a court makes an order under section 3(6), 7(5), 8(5) or 9(8), and

(b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.

(3) The court must keep under review the question whether at any given time it is still not in the public interest to disclose material affected by its order.

(4) The court must keep the question mentioned in subsection (3) under review without the need for an application; but the accused may apply to the court for a review of that question.

(5) If the court at any time concludes that it is in the public interest to disclose material to any extent-

(a) it shall so order, and

(b) it shall take such steps as are reasonable to inform the prosecutor of its order.

(6) Where the prosecutor is informed of an order made under subsection (5) he must act accordingly having regard to the provisions of this Part (unless he decides not to proceed with the case concerned).

16. Applications: opportunity to be heard.

Where-

(a) an application is made under section 3(6), 7(5), 8(5), 9(8), 14(2) or 15(4),

(b) a person claiming to have an interest in the material applies to be heard by the court, and

(c) he shows that he was involved (whether alone or with others and whether directly or indirectly) in the prosecutor's attention being brought to the material,

the court must not make an order under section 3(6), 7(5), 8(5), 9(8), 14(3) or 15(5) (as the case may be) unless the person applying under paragraph (b) has been given an opportunity to be heard.

Confidentiality

17. - Confidentiality of disclosed information.

(1) If the accused is given or allowed to inspect a document or other object under-

(a) section 3, 4, 7, 9, 14 or 15, or

(b) an order under section 8,

then, subject to subsections (2) to (4), he must not use or disclose it or any information recorded in it.

(2) The accused may use or disclose the object or information-

(a) in connection with the proceedings for whose purposes he was given the object or allowed to inspect it,

(b) with a view to the taking of further criminal proceedings (for instance, by way of appeal) with regard to the matter giving rise to the proceedings mentioned in paragraph (a), or

(c) in connection with the proceedings first mentioned in paragraph (b).

(3) The accused may use or disclose-

(a) the object to the extent that it has been displayed to the public in open court, or

(b) the information to the extent that it has been communicated to the public in open court;

but the preceding provisions of this subsection do not apply if the object is displayed or the information is communicated in proceedings to deal with a contempt of court under section 18.

(4) If-

(a) the accused applies to the court for an order granting permission to use or disclose the object or information, and

(b) the court makes such an order,

the accused may use or disclose the object or information for the purpose and to the extent specified by the court.

(5) An application under subsection (4) may be made and dealt with at any time, and in particular after the accused has been acquitted or convicted or the prosecutor has decided not to proceed with the case concerned; but this is subject to rules made by virtue of section 19(2).

(6) Where-

(a) an application is made under subsection (4), and

(b) the prosecutor or a person claiming to have an interest in the object or information applies to be heard by the court,

the court must not make an order granting permission unless the person applying under paragraph (b) has been given an opportunity to be heard.

(7) References in this section to the court are to-

(a) a magistrates' court, where this Part applies by virtue of section 1(1);

(b) the Crown Court, where this Part applies by virtue of section 1(2).

(8) Nothing in this section affects any other restriction or prohibition on the use or disclosure of an object or information, whether the restriction or prohibition arises under an enactment (whenever passed) or otherwise.

18. - Confidentiality: contravention.

(1) It is a contempt of court for a person knowingly to use or disclose an object or information recorded in it if the use or disclosure is in contravention of section 17.

(2) The following courts have jurisdiction to deal with a person who is guilty of a contempt under this section-

(a) a magistrates' court, where this Part applies by virtue of section 1(1);

(b) the Crown Court, where this Part applies by virtue of section 1(2).

(3) A person who is guilty of a contempt under this section may be dealt with as follows-

(a) a magistrates' court may commit him to custody for a specified period not exceeding six months or impose on him a fine not exceeding £5,000 or both;

(b) the Crown Court may commit him to custody for a specified period not exceeding two years or impose a fine on him or both.

(4) If-

(a) a person is guilty of a contempt under this section, and

(b) the object concerned is in his possession,

the court finding him guilty may order that the object shall be forfeited and dealt with in such manner as the court may order.

(5) The power of the court under subsection (4) includes power to order the object to be destroyed or to be given to the prosecutor or to be placed in his custody for such period as the court may specify.

(6) If-

(a) the court proposes to make an order under subsection (4), and

(b) the person found guilty, or any other person claiming to have an interest in the object, applies to be heard by the court,

the court must not make the order unless the applicant has been given an opportunity to be heard.

(7) If-

(a) a person is guilty of a contempt under this section, and

(b) a copy of the object concerned is in his possession,

the court finding him guilty may order that the copy shall be forfeited and dealt with in such manner as the court may order.

(8) Subsections (5) and (6) apply for the purposes of subsection (7) as they apply for the purposes of subsection (4), but as if references to the object were references to the copy.

(9) An object or information shall be inadmissible as evidence in civil proceedings if to adduce it would in the opinion of the court be likely to constitute a contempt under this section; and "the court" here means the court before which the civil proceedings are being taken.

(10) The powers of a magistrates' court under this section may be exercised either of the court's own motion or by order on complaint.

Other provisions

19. - Rules of court.

(1) Without prejudice to the generality of subsection (1) of-

(a) section 144 of the Magistrates' Courts Act 1980 (magistrates' court rules), and

(b) section 84 of the Supreme Court Act 1981 (rules of court),

the power to make rules under each of those sections includes power to make provision mentioned in subsection (2).

(2) The provision is provision as to the practice and procedure to be followed in relation to-

(a) proceedings to deal with a contempt of court under section 18;

(b) an application under section 3(6), 7(5), 8(2) or (5), 9(8), 14(2) , 15(4), 16(b), 17(4) or (6)(b) or 18(6);

(c) an application under regulations made under section 12;

(d) an order under section 3(6), 7(5), 8(2) or (5), 9(8), 14(3), 17(4) or 18(4) or (7);

(e) an order under section 15(5) (whether or not an application is made under section 15(4));

(f) an order under regulations made under section 12.

(3) Rules made under section 144 of the Magistrates' Courts Act 1980 by virtue of subsection (2)(a) above may contain or include provision equivalent to Schedule 3 to the Contempt of Court Act 1981 (proceedings for disobeying magistrates' court order) with any modifications which the Lord Chancellor considers appropriate on the advice of or after consultation with the rule committee for magistrates' courts.

(4) Rules made by virtue of subsection (2)(b) in relation to an application under section 17(4) may include provision-

(a) that an application to a magistrates' court must be made to a particular magistrates' court;

(b) that an application to the Crown Court must be made to the Crown Court sitting at a particular place;

(c) requiring persons to be notified of an application.

(5) Rules made by virtue of this section may make different provision for different cases or classes of case.

20. Other statutory rules as to disclosure. –

(1) A duty under any of the disclosure provisions shall not affect or be affected by any duty arising under any other enactment with regard to material to be provided to or by the accused or a person representing him; but this is subject to subsection (2).

(2) In making an order under section 9 of the Criminal Justice Act 1987 or section 31 of this Act (preparatory hearings) the judge may take account of anything which-

(a) has been done,

(b) has been required to be done, or

(c) will be required to be done,

in pursuance of any of the disclosure provisions.

(3) Without prejudice to the generality of section 144(1) of the Magistrates' Courts Act 1980 (magistrates' court rules) the power to make rules under that section includes power to make, with regard to any proceedings before a magistrates' court which relate to an alleged offence, provision for-

(a) requiring any party to the proceedings to disclose to the other party or parties any expert evidence which he proposes to adduce in the proceedings;

(b) prohibiting a party who fails to comply in respect of any evidence with any requirement imposed by virtue of paragraph (a) from adducing that evidence without the leave of the court.

(4) Rules made by virtue of subsection (3)-

(a) may specify the kinds of expert evidence to which they apply;

(b) may exempt facts or matters of any description specified in the rules.

(5) For the purposes of this section-

(a) the disclosure provisions are sections 3 to 9;

(b) "enactment" includes an enactment comprised in subordinate legislation (which here has the same meaning as in the Interpretation Act 1978).

21. - Common law rules as to disclosure.

(1) Where this Part applies as regards things falling to be done after the relevant time in relation to an alleged offence, the rules of common law which-

(a) were effective immediately before the appointed day, and

(b) relate to the disclosure of material by the prosecutor,

do not apply as regards things falling to be done after that time in relation to the alleged offence.

(2) Subsection (1) does not affect the rules of common law as to whether disclosure is in the public interest.

(3) References in subsection (1) to the relevant time are to the time when-

(a) the accused pleads not guilty (where this Part applies by virtue of section 1(1)),

(b) the accused is committed for trial (where this Part applies by virtue of section 1(2)(a))

(c) the proceedings are transferred (where this Part applies by virtue of section 1(2)(b) or (c)),

(d) the count is included in the indictment (where this Part applies by virtue of section 1(2)(d)), or

(e) the bill of indictment is preferred (where this Part applies by virtue of section 1(2)(e)).

(4) The reference in subsection (1) to the appointed day is to the day appointed under section 1(5).

Summary of Interviews

Group	N	Details	Date of Interviews
Solicitors	18	6 Town A; 4 City B; 4 Town D; 3 Town E; 1 Town F	1998.
Legal Executives	8	5 former police officers (2 Town A; 4 City B; 1 City C; 1 Town D)	1998
Barristers	15	City B	Jan-June 1999
	1	Town A	August 1998
Police	9	Station A2: 3 PS, 1 custody sgt, 1 DS, 2DC 2 PC	July 1999
	5	Station B3: 1 DS, 2 DCs and 2 PC.	June 1999
	1	Station B2 CJU	June 1999
	1	Station H3 disclosure officer	June 1999
	1	Station F2 custody sergeant	May 1999
CPS	14	Branch A 2 BCP, 1 PCP, 7 SCP, 2 EO.	Autumn 1998.
	12	Branch C 2 PCPs, 6 SCP and 4 EO.	Autumn 1998
Lay Magistrates	5	Town A, City B, Town K, City C, Town H	April-June 1999
Stipendiary Magistrates	2	Town A. City C	April-June 1999
Clerks to the Justices	6	Town A, 2x City B, Town K, City C, Town H	April-June 1999
Judges	2	City B	end of 1998.
TOTAL	100		

Solicitors' Interview Schedule

Preamble: This is a 3 year project looking at how the changes made to the right of silence and the disclosure provisions are working in the Region X. I am interviewing solicitors, barristers, CPS, clerks and, hopefully, the police. Having read the literature, I want to find out how the legislation is working in practice. The first section of questions is about police station work, the second about the right of silence and the third about defence disclosure.

- Could you tell me a bit about the firm and the kind of work that you do?

Representation at the Police Station

- Who does most of the police station work? How often do you go?

- Do you use clerks to deputise for you at the police station? Is this on a rota system? What kind of back-up do they need?

- Do you normally attend the police station if the client is going to be interviewed? When wouldn't you?

- Can you talk me through what happens when you go to the police station? (What information do you get from the custody/investigating officers? How long does the consultation take?)

- Do you think suspects understand the caution? Do you explain it to them / get the police to explain it?

- Have you come across any instances of 'non-verballing'?

- Do you usually stay for the interview? In which cases would you leave?

- If you stay for the interview, do you remain there until your client has been charged / released?

- Is it often necessary to intervene in police interviews, or would you say that it is counter-productive? What kind of behaviours or questioning would make you do so?

- How do you regard your professional relationship with the police?

- What do you think of police interviewing techniques? (age, uniform /CID). Have they improved?)

- How well do you think suspects are protected in police custody (both represented and unrepresented)?

- According to a recent Home Office study, Town A has the lowest rate for legal advice at the police station in the country (half the national average). Can you think of any possible reasons for this?

The Right of Silence:

- How did you feel about the changes made to the right of silence when they were introduced?
- Have those feelings changed now that you have had a chance to work under that legislation?
- How many cases have you had where silence has been an issue (more / less since legislation changed?)
- Under what, if any, circumstances would you advise silence now?
- Have the changes meant you having to change you practice? (e.g. note taking, opening statement).
- Have you noticed the police changing their practice since the legislation changed (more disclosure? less pressure on silent suspect?)
- What tactics do / did they use to persuade a suspect to answer questions?
- Do you put your reasons for advising silence on record during the interview?
- Do you think that the introduction of the CJPOA has changed the position of unrepresented suspects?
- Do you ever advise a client to remain silent during interview then to hand in a statement at charge? Would you consider doing this?
- When representing a suspect in court, under what circumstances, if any, would you advise them to remain silent?
- Do you find some suspects routinely want to remain silent in police interviews and at trial? How strongly would you advise them against this?
- Have you found judges / magistrates prepared to draw inferences from your clients' failure to answer police questions or to testify?
- Does it make a difference where the case is heard (judge / magistrates / stipendiary / different courts)?
- Have you had to give evidence as to why you advised your client not to answer police questions?
- How do you feel about this possibility?
- If you were advising a client to remain silent do you think it is necessary to warn him/her that you may have to waive privilege?

Pre-Trial Disclosure Provisions:

- How did you feel about the introduction of defence disclosure?
- Have those feelings changed now that you have had a chance to work under that legislation?
- How do you go about drafting the defence statement? How brief can it be? Who in your office does this?
- Do you draft the defence statement or do you get counsel involved?
- How useful is the primary prosecution schedule? Is it detailed enough? Does it vary between police stations?
- Is there any difference with different investigating agencies (e.g. Customs & Excise?)
- How co-operative are the CPS being about making secondary prosecution disclosure?
- Have you ever been prevented from having a copy of material that has been disclosed to you?
- Have you had any problems with sensitive material being withheld?
- Have you found the courts are enforcing the provisions, especially the time limit? Do you think this will change (especially the brevity of the statement you can submit?)
- Have you applied for an extension to the 14 day period, was it granted?
- Under what, if any, circumstances would you advise a client not to submit a defence statement?
- Have you come across the prosecution making primary prosecution disclosure before committal?
- Have you found the prosecution using the defence statement as evidence?
- Do you ever serve defence disclosure statements in summary only cases, or do you get adequate disclosure?
- **Conclusion:**
- Which chambers do you instruct?
- Is there anybody you would recommend that I ask for an interview?

Legal Executives' Interview Schedule

Preamble: This is a 3 year project looking at how the changes made to the right of silence provisions and pre-trial disclosure are working in the Region X. I am interviewing solicitors, barristers, CPS, clerks and, hopefully, the police to find out how the legislation is working in practice. The first section of questions is about police station work and the second about the right of silence and the third is about disclosure.

- Could you tell me a bit about the firm, your experience and the kind of work that you do?

Representation at the Police Station

- Who does most of the police station work at your firm? How often do you go?

- How is it decided what cases you get? Is this on a rota system? What kind of back-up do you get?

- Do you normally attend the police station if the client is going to be interviewed? When wouldn't you?

- Can you talk me through what happens when you go to the police station? (What information do you get from the custody/investigating officers? How long does the consultation take?)

- Do you think suspects understand the caution? Do you explain it to them / get the police to explain it? How?

- Have you come across any instances of 'non-verballing'?

- Do you usually stay for the interview? In which cases would you leave?

- If you stay for the interview, do you remain there until your client has been charged / released?

- Is it often necessary to intervene in police interviews, or would you say that it is counter-productive? What kind of behaviours or questioning would make you do so?

- How do you regard your professional relationship with the police?

- What do you think of police interviewing techniques? (age, uniform /CID). Have they improved?)

- How well do you think suspects are protected in police custody (both represented and unrepresented)?

- According to a recent Home Office study, Town A has the lowest rate for legal advice at the police station in the country (half the national average). Can you think of any possible reasons for this?

The Right of Silence:

- How did you feel about the changes made to the right of silence when they were introduced?
- Have those feelings changed now that you have had a chance to work under that legislation?
- How many cases have you had where silence has been an issue (more / less since legislation changed?)
- Under what, if any, circumstances would you advise silence now?
- Have the changes meant you having to change you practice? (e.g. note taking, opening statement).
- Have you noticed the police changing their practice since the legislation changed (more disclosure? less pressure on silent suspect?)
- What tactics do / did they use to persuade a suspect to answer questions?
- Do you put your reasons for advising silence on record during the interview?
- Do you ever advise a client to remain silent during interview then to hand in a statement at charge? Would you consider doing this?
- Do you find some suspects routinely want to remain silent in police interviews? How strongly would you advise them against this?
- Have you had to give evidence as to why you advised your client not to answer police questions?
- How do you feel about this possibility?
- If you were advising a client to remain silent, do you think it is necessary to warn him/her that you may have to waive privilege?

Pre-Trial Disclosure Provisions:

- How did you feel about the introduction of defence disclosure?
- Have those feelings changed now that you have had a chance to work under that legislation?
- How do you go about drafting the defence statement? How brief can it be? Who in your office does this?
- Do you draft the defence statement or do you get counsel involved?
- How useful is the primary prosecution schedule? Is it detailed enough? Does it vary between police stations?

- Is there any difference with different investigating agencies (e.g. Customs & Excise?)
- How co-operative are the CPS being about making secondary prosecution disclosure?
- Have you ever been prevented from having a copy of material that has been disclosed to you?
- Have you had any problems with sensitive material being withheld?
- Have you found the courts are enforcing the provisions, especially the time limit? Do you think this will change (especially the brevity of the statement you can submit?)
- Have you applied for an extension to the 14 day period, was it granted?
- Have you come across the prosecution making primary prosecution disclosure before committal?
- Have you found the prosecution using the defence statement as evidence?
- Do you ever serve defence disclosure statements in summary only cases, or do you get adequate disclosure?

Conclusion:

- Is there anybody you would recommend that I ask for an interview?

Barristers' Interview Schedule

Preamble: This is a 3 year project looking at how the changes made to the right of silence and the disclosure provisions are working in Region X. I am interviewing solicitors, barristers, CPS, clerks and, hopefully, the police. Having read the literature, I want to find out how the legislation is working in practice. The first section of questions is about the right of silence and the second about the disclosure provisions.

- Could you tell me a bit about your chambers and the kind of work that you do?

The Right of Silence:

- How did you feel about the changes made to the right of silence when they were introduced?

- Have those feelings changed now that you have had a chance to work under that legislation?

- How many cases have you had where silence (at the police station and at court) has been an issue (more / less since legislation changed?)

- How well do you think suspects are protected in police custody (both represented and unrepresented).

- According to a recent Home Office study, Town A has the lowest rate for legal advice at the police station in the country (half the national average). Can you think of any possible reasons for this?

- What do you think of police (and other investigating agencies') interviewing techniques? Have they improved?

- Have you come across examples of 'non-verballing'?

- Under what circumstances, if any, would you advise a client not to testify?

- Have you found judges / magistrates prepared to draw inferences from your clients' failure to answer police questions or to testify?

- Does it make a difference which court the case is tried in?

- Have you had to call upon a solicitor to give evidence as to why they advised silence at the police station? How do you feel about this prospect?

- If you were representing a defendant and their silence was an issue, what kind of reference would you make to it in your closing speech?

Pre-Trial Disclosure Provisions:

- Professionally speaking, then personally, how did you feel about the introduction of the disclosure provisions?

- Have those feelings changed now that you have had a chance to work under that legislation?

- Are you involved with the drafting of defence disclosure statements?

- How useful is the primary prosecution schedule? Is it detailed enough? Does it vary between police stations?

- Is there any difference with different investigating agencies (e.g. Customs & Excise?)

- How co-operative are the CPS being about making secondary prosecution disclosure?

- Have you ever been prevented from having a copy of material that has been disclosed to you?

- Have you had any problems with sensitive material being withheld?

- Have you found the courts are enforcing the provisions, especially the time limit? Do you think this will change (especially the brevity of the statement you can submit?)

- Under what, if any, circumstances would you advise a client not to submit a defence statement?

- Have you come across the prosecution making primary prosecution disclosure before committal?

- Have you found the prosecution using the defence statement as evidence?

Conclusion:

- Which solicitors instruct you?

- Is there anybody you would recommend that I ask for an interview?

Police Interview Schedule

Preamble: This is a 3 year project looking at how the changes made to the right of silence and the disclosure provisions are working in the Region X. I am interviewing solicitors, barristers, CPS, clerks as well as the police. Having read the literature, I want to find out how the legislation is working in practice. The first section of questions is about the right of silence at the police station and the second is about pre-trial disclosure.

- Could you tell me a bit your career in the police force?

The Right of Silence

- How did you feel about the changes made to the right of silence when they were introduced?

- Have those feelings changed now that you have had a chance to work under that legislation?

- How many cases have you had where silence has been an issue (more / less since legislation changed?) Can you describe the last one?

- Can you talk me through what happens once you have arrested a suspect? When do you caution? What is the purpose of the interview?

- What training in interviewing techniques have you received and when?

- Who normally explains caution? How would you explain the caution to someone who did not understand it?

- Do you think most suspects understand the caution? (first timers, juveniles?)

- Have the changes meant you having to change your practice? (e.g. disclosure).

- Do you find some suspects routinely want to remain silent in police interviews? What kind of suspects go 'no comment'? Represented?

- What role do you think defence lawyers play at interview? (interventions, help/hinder?)

- Do their consultations take longer now?

- Why do you think so many suspects turn down legal representation?

- What do you do if a suspect refuses to answer questions? (Different to before?)

- When do you give a s36/7 (special) warning? How? Do they encourage suspects to answer?

- Do you take silence into account when charging?

- Do you know what happens when 'no comment' cases get to trial? Is it easier to get convictions now?

Pre-Trial Disclosure Provisions:

- How did you feel about the introduction of pre-trial disclosure?
- Have those feelings changed now that you have had a chance to work under that legislation?
- Who normally acts as disclosure officer at your station?
- Have you acted as a disclosure officer?
- What do the changes mean for the police (cost / workload / investigation / have you changed your practice / is it the best way?)
- What do you put on the primary prosecution schedule? How much detail? Do the CPS query much?
- What kind of material comes out in secondary prosecution disclosure?
- What kind of material do you put on the sensitive material schedule?
- How are the CPS using the provisions?
- Have you found the courts are enforcing the provisions, especially the time limit? Do you think this will change?
- Do you have time to keep the material under review? How often do you go back to material?
- Do you think any further changes are needed?
- What kind of a relationship do you have with the CPS?

C.P.S. Interview Schedule

Preamble: This is a 3 year project looking at how the changes made to the right of silence and the disclosure provisions are working in the Region X. I am interviewing solicitors, barristers, CPS, clerks and, hopefully, the police. Having read the literature, I want to find out how the legislation is working in practice. The first section of questions is about the right of silence and the second about the disclosure provisions.

- Could you tell me a bit about your experience in the CPS and what kind of work you did before that?

- Can you explain to me what happens to a case, once it is received from the police - is it the same people who prepare a case who oversee disclosure and who take it to court. When do counsel get involved?

The Right of Silence:

- How did you feel about the changes made to the right of silence when they were introduced?

- Have those feelings changed now that you have had a chance to work under that legislation?

- How many cases have you had where silence (at the police station and at court) has been an issue (more / less since legislation changed?)

- How well do you think suspects are protected in police custody (both represented and unrepresented).

- What do you think of police (and other investigating agencies') interviewing techniques? Have they improved?

- Have you come across examples of 'non-verballing'?

- What kind of comment, if any, would you make from a defendant's failure to answer police questions or to testify? What influences your decision?

- Have you found judges / magistrates prepared to draw inferences from a defendant's failure to answer police questions or to testify?

- Does it make a difference which court the case is tried in?

- Have you had to cross-examine a solicitor as to why they advised silence at the police station? How do you feel about this prospect?

- Would you cross-examine a solicitor about all the advice they had given if they had then waived privilege?

Pre-Trial Disclosure Provisions:

- How did you feel about the introduction of the disclosure provisions?
- Have those feelings changed now that you have had a chance to work under that legislation?
- How detailed are the schedules the police are providing? Are there any problems with them doing this job?
- Do you ever have to ask to inspect material that is on this schedule?
- Is there time for the CPS and the police to keep the unused material under review? How often would you make additional disclosure?
- What happens in cases where there are co-defendants (handled by same person / same disclosure / what if material generated by investigation into co-accused?)
- How are you interpreting the 'might undermine' test?
- Would evidence that would be inadmissible at trial be disclosed to the defence?
- How often do you apply to the courts for sensitive material to be withheld? What kind of information would this be? Which way do the courts tend to rule?
- How common are *ex parte* hearings regarding sensitive disclosure? What kind of information would this cover? Which way do the courts tend to rule?
- At what stage do you make primary prosecution disclosure? (Is it ever before committal?)
- How strictly are the provisions for secondary prosecution disclosure being interpreted, especially defence requests for certain information?
- Have you found the courts are enforcing the provisions, especially the time limit? Do you think this will change (especially the brevity of the statement that can be submitted?)
- Do you (or would you) ever use the defence statement as evidence against the defendant (e.g. if they admit self defence, to prove they struck a blow?)
- If a defendant had failed to answer police questions and to submit a defence statement, would you attempt to persuade the jury to draw 'multiple inferences' from this?

Conclusion:

- Which barristers do you instruct?
- Is there anybody you would recommend that I ask for an interview?

Magistrates' Interview Schedule

Preamble: This is a 3 year project looking at how the changes made to the right of silence are working in the Region X. As you are no doubt aware, under the Criminal Justice and Public Order Act 1994, courts can draw an inference from a suspect's failure to mention when questioned by the police, a defence they rely on in court or from a suspect's failure to explain their presence near the scene of the crime or objects or marks about their person and fourthly, from a defendant's failure to give evidence at trial. I am interviewing solicitors, barristers, CPS, clerks and, hopefully, the police to find out how the legislation is working in practice.

- Could you tell me about your work as a magistrate; how long you have served, what kind of courts etc, how often do you sit?

The Right of Silence:

- How did you feel about the changes made to the right of silence when they were introduced? (necessary?)

- Have those feelings changed now that you have had a chance to work under that legislation?

- How many cases have you seen where silence (at the police station and/or at court) has been an issue (more/less since legislation changed?)

- How well do you think suspects are protected in police custody (both represented and unrepresented).

- Have you come across examples of 'non-verballing' - the police saying that a suspect said nothing when arrested, when the suspect said that they did speak?

- Could you explain to me how you would decide what inferences, if any, to draw from a suspect's failure to answer police questions or to testify?

- Under what kind of circumstances, if any, would you not draw adverse inferences (representation, inadequate disclosure?).

- Were inferences drawn anyway?)

- Does it make a difference how the bench is constituted?

- Have you sat at trial where the defence solicitor has had to give evidence as to why they advised silence at the police station? How do you feel about this?

Pre-Trial Disclosure Provisions:
Under the Criminal Procedure and Investigations Act 1996, the defence can submit a defence statement to the court and the prosecution in order to gain disclosure of unused material from the prosecution

- Have you come across any cases where the defence have submitted a defence statement?
- Professionally speaking, then personally, how did you feel about the introduction of the disclosure provisions?
- Have those feelings changed now that you have had a chance to work under that legislation?
- Have you had any experience of sensitive material being withheld?
- How strictly are you enforcing the provisions, especially the 14 day time limit? Do you think this will change (especially the brevity of the statement you can submit?)
- Under what, if any, circumstances would you not draw adverse inferences from a defendant's failure to submit a defence statement?
- Have you come across the prosecution making primary prosecution disclosure before committal?
- Have you found the prosecution using the defence statement as evidence?)

Magistrates' Clerks' Interview Schedule

Preamble: This is a 3 year project looking at how the changes made to the right of silence and the disclosure provisions are working in the Region X. I am interviewing solicitors, barristers, CPS, clerks and, hopefully, the police. Having read the literature, I want to find out how the legislation is working in practice.

- Could you tell me about the court and your work here, previous experience etc.

The Right of Silence:

- How did you feel about the changes made to the right of silence when they were introduced?
- Have those feelings changed now that you have had a chance to work under that legislation?
- How many cases have you seen where silence (police station and court) has been an issue (more / less? describe them?)
- Have you come across any instances of 'non-verballing'?
- How well do you think suspects are protected in police custody (both represented and unrepresented)?
- What advice would / do you give magistrates where silence is an issue - extenuating circumstances?
- Have you found magistrates prepared to draw inferences from a defendant's failure to answer police questions or to testify?
- Does it make a difference which bench is sitting?
- Have you seen a legal adviser give evidence as to why they advised their client not to answer police questions?

Pre-Trial Disclosure Provisions:

- Have you come across any cases where the defence have submitted a defence statement?
- How did you feel about the introduction of defence disclosure? - has that changed?
- Have you had any experience of sensitive material being withheld?
- How strictly are the magistrates enforcing the provisions, especially the time limit? Do you think this will change (especially the brevity of the statement you can submit?)
- Have you come across the prosecution making primary disclosure before committal?
- Have you found the prosecution using the defence statement as evidence?
- Which solicitors should I ask for an interview?

Judges' Interview Schedule

Preamble: This is a 3 year project looking at the changes made to the right of silence and the introduction of disclosure requirements with reference to how they are working in the Region X. I will be interviewing solicitors, barristers, CPS, clerks and the police as well. The first section of questions is about the right of silence and the second about disclosure.

- Could you tell me a bit about your career; what kind of work did you do before becoming a judge (prosecution / defence), have you always worked in the Region X, how long have you been a judge for?

- How did you feel about the changes made to the right of silence when they were introduced?

- Have those feelings changed now that you have had a chance to work under that legislation?

- Is it something you discussed with your colleagues? How did they feel about the changes? Did you have training on it?

- How often do you come across cases where the suspect has remained silent / refused to testify? Is this more/less frequent since the legislation changed?

- Could you explain to me how you would decide what inferences, if any, to draw from a suspect's failure to answer police questions or to testify?

- Generally speaking, under what kind of circumstances would you not draw an inference from a defendant's silence (at police station then at court)? Can you give me any examples of cases that you have had?

- Does it make a difference if the defendant was not legally represented at the police station?

- Have you had any cases where the solicitor has had to give evidence as to why they advised their client not to answer police questions?

- Do you find some defendants routinely remain silent in police interviews and at trial?

- What kind of warning do you give juries about drawing inferences from silence?

- Do you think that the legislation has made it easier to 'convict criminals' as the then government intended?

- Do you think that juries probably always drew adverse inferences anyway from a defendant's silence/failure to testify?

Attitudes towards Defence Disclosure:

- How did you feel about the introduction of the disclosure provisions?
- Have those feelings changed now that you have had a chance to work under that legislation?
- What, if any, problems have you encountered?
- How useful are defence statements? Are they detailed enough? What do you do if they are not?
- What action do you take if the 14-day time limit is exceeded? Do you grant extensions? What affects your decision?
- Are there any circumstances under which you would not allow a jury to draw adverse inferences from a defendant's failure to submit a defence statement?
- How frequently do the prosecution apply for PII certificates? How do you feel about this? What do you think of the balance that has been struck between the interests of the prosecution and the defence?
- How common are *ex parte* hearings regarding sensitive disclosure? What kind of information would this cover? Which way do you tend to rule?
- If a defendant had failed to answer police questions, to submit a defence statement and to testify at court, would you advise the jury they could draw 'multiple inferences' from this?
- Have you found the prosecution trying to use the defence statement as evidence?
- Is there anybody else that you would suggest that I interviewed?

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Dear Officer

Right of Silence and Disclosure of Unused Material Research

I am a researcher looking at the changes made to the right of silence (ss34-39 of the Criminal Justice and Public Order Act 1994) and to the disclosure of unused material (Part 1 of the Criminal Procedure and Investigations Act 1996).

I want to find out what difference (if any) the legislation has made in practice e.g. does it affect the way in which you do your job or your workload?

I would be very grateful if you would take some time to fill in this questionnaire. Your opinions will be used to find out what officers in the Region X think. I will also use your answers in drawing up the questions for the second part of my research which involves interviewing a number of officers.

I have designed the questionnaire so that you can answer most of the questions by ticking boxes so that it is quicker for you. Some of the questions ask you to write a few lines. If you want to make further comments in answer to any of the questions or in relation to the right of silence and disclosure more generally, then please do so on the back of the form or attach another sheet of paper. Your comments would be very much appreciated.

Please post your completed questionnaire back to me in the attached pre-paid envelope as soon as possible. The forms will not be seen by anyone from Region X Police and any comments you make will not be attributed to you as individuals in my thesis.

Many thanks for your help,

Hannah Quirk.

ANYTHING YOU WRITE WILL BE TREATED IN CONFIDENCE AND WILL NOT BEEN SEEN BY ANYBODY FROM REGION X POLICE.

Right of Silence:

1. Do you think that the changes made to the right of silence were
   necessary ☐ unnecessary ☐ don't know ☐ wasn't serving then ☐
   Why?.....
   .....
   .....

2. If a suspect is legally represented, who actually explains the caution to them?
   You ☐ legal representative ☐ both of you ☐

3. Do you think most first time suspects understand the caution? Yes ☐ No ☐

4. Do you think most juveniles understand the caution? Yes ☐ No ☐

5. Do you think more experienced offenders understand the caution? Yes ☐ No ☐

6. What percentage of interviews that you do are completely or mostly 'no comment'? ____%. (If it is easier, how many a week or month do you see?) _____ week /month.

7. Is that more ☐ less ☐ about the same ☐ since the legislation changed?

8. In what situations do suspects tend to go 'no comment'? (e.g. does it depend on the suspect / the offence / the lawyer / something else?) .....
   .....
   .....
   .....

9. Do you know what happens when 'no comment' cases get to trial (e.g. do suspects tend to plead guilty, get convicted or acquitted? Is the silence commented on?)
   .....
   .....
   .....

10. What percentage of suspects who go 'no comment' are legally represented? _____%

11. If there is a legal representative present do you usually:
    give them an outline of the case? ☐ read them the main points from the statements? ☐
    let them read through the evidence? ☐ let them have copies of the evidence? ☐
    other ☐ please describe .....
    .....

12. If a suspect is not legally represented do you
    give them an outline of the case? ☐ read them the main points from the statements? ☐
    let them read through the evidence? ☐ let them have copies of the evidence? ☐
    other ☐ please describe .....
    .....

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13. Why do you think so many suspects do not ask for legal representation?

    .....

    .....

    .....

14. Since the legislation changed, do legal advisers' consultations with the suspect take
    less time? ☐ more time? ☐ the same time? ☐ don't know? ☐

15. Could you describe the role you think legal advisers play in interviews?

    .....

    .....

    .....

16. How often do legal advisers intervene, if they do, what for? Do they help / hinder etc.

    .....

    .....

17. Since the legislation changed, do your interviews with suspects take
    less time? ☐ more time? ☐ the same time? ☐ don't know? ☐

18. What do you usually do if a suspect refuses to answer questions
    carry on putting questions to them? ☐ give them a special warning? ☐
    try to get them to talk about something else? ☐ terminate the interview? ☐
    advise them it is in their interests to speak? ☐ stop and re-interview later? ☐
    other? ☐ (please describe) .....

    .....

    .....

19. In what percentage of interviews do you give a s36 /37 (special) warning? _____%
    (If it is easier, how many a week or month do you do.) _____ week /month.

20. Do suspects then provide an explanation sometimes ☐ always ☐ never ☐

21. How important are confessions in securing a conviction? .....

    .....

    .....

22. Do you think that the changes to the right of silence have made it easier to achieve convictions? Yes ☐ No ☐ Don't know ☐

23. Could you briefly describe the last 'no comment' interview you had (if applicable), including when it was, what the offence was, what the suspect was like, whether they were represented and whether they maintained silence or spoke at a later stage?

    .....

    .....

    .....

ANYTHING YOU WRITE WILL BE TREATED IN CONFIDENCE AND WILL NOT BEEN SEEN BY ANYBODY FROM REGION X POLICE.

Disclosure:

1. Do you think the changes to disclosure made by the 1996 Act were necessary? ☐ unnecessary? ☐ Why?.....
.....
.....
.....

2. Have you ever acted as a disclosure officer? Yes ☐ No ☐

3. If yes, do you feel that you have received enough training for this? Yes ☐ No ☐

4. Have the provisions increased ☐ decreased ☐ made no difference ☐ to your workload?

5. Do the CPS call for unused material to inspect never ☐ sometimes ☐ frequently ☐

6. In a run of the mill case, how often to you have to return to the undisclosed material once you have sent the schedules to the CPS? Never ☐ 1-3 ☐ 4-5 ☐ 5+ ☐

7. In a serious / complex case, how often to you have to return to the undisclosed material once you have sent the schedules to the CPS? Never ☐ 1-3 ☐ 4-5 ☐ 5+ ☐

8. Do you have time to keep the unused material under review? Yes ☐ No ☐

9. In what percentage of cases do you find material for secondary disclosure? _____%

10. Apart from obvious cases like informants' names and observation points, what other kind of material do you put on the sensitive information schedule?.....
.....

11. What do you think of the work of the CPS (including managing disclosure, pursuing cases, altering charges, relations with the police etc.?) .....
.....
.....
.....
.....

About You:

male / female OCU _____ Specialist Squad Membership? _____

Rank: Inspector ☐ DI ☐ DS ☐ PS ☐ DC ☐ PC ☐

Years of Service: 0-5 ☐ 6-10 ☐ 11-15 ☐ 16-20 ☐ 21+ ☐

THANK YOU FOR TAKING THE TIME TO COMPLETE THIS QUESTIONNAIRE, YOUR COMMENTS ARE GREATLY APPRECIATED

If you would like to write more about the changes to the right of silence or the new disclosure regime, please do so on the back of this page.